

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

CIVIL APPEAL NO. ABU0088 OF 2005S
(High Court Civil Action No. HBC 30/2003S)

BETWEEN: MOHAMMED YUNUS

Appellant

AND: DIRECTOR OF IMMIGRATION
 AND OTHERS

Respondents

Coram: Byrne, JA
 Goundar, JA
 Datt, JA

Hearing: Tuesday, 1 April 2008, Suva

Counsel: S Sharma] for the Appellant
 R Singh] for the Appellant

 S Sharma] for the Respondents

Date of Judgment: Friday, 25 April 2008, Suva

JUDGMENT OF THE COURT

Introduction

- [1] This is an appeal by the Appellant against the decision of His Lordship Mr Justice Pathik, of the High Court who dismissed the Appellant's substantive application for judicial review against the decision, of the Public Service Commission, when the Appellant had already appealed against the decision of the Commission to the Appeals Board. The Appellant did not seek review of the decision of the Board but only referred to the decision of the Commission.

- [2] The Appellant raises a primary question in his appeal that His Lordship erred in dismissing his application for leave to seek judicial review 20 months out of time.

History:

- [3] On 1 September 2001 the Director of Immigration charged the Appellant and referred the matter to the Public Service Commission, which is a separate authority under the Public Service Act 1999. The Commission is charged with the statutory obligation to consider the charges made by the Director against the Appellant. The Commission heard the complaint against the Appellant and on 1 February 2002, held that the Appellant was guilty of the charges and imposed a fine and transferred him to the Ministry of Home Affairs.
- [4] Thereafter, the Appellant appealed the decision of the Commission to the Public Service Board. After a full hearing on merits, the Board, on 24 July 2002 confirmed the decision of the Public Service Commission.
- [5] In exercising his statutory right, on 13 October, 2003, the Appellant filed an application for leave to apply for judicial review against the decision of the Commission which was in the first instance handed down on 1 February 2001, when the Appellant clearly was 20 months [from 1/2/2002 to 13/10/2003] out of time from the date when his right to action first accrued to seek review of the Commission's decision.
- [6] In his application for judicial review the Appellant sought leave from the High Court to review the decision of the Director of Immigration, basically alleging that the Director did not have the power to lay disciplinary charges against him when he referred the Appellant to the Commission to deal with the allegation of mis-conduct.
- [7] The crucial failure of the Appellant's case is that he did not seek to review the decision of the Board, but sought to review the decision of the Commission

which had been superseded by the decision of the Appeals Board delivered on 24 July, 2002.

- [8] High Court Rules Order 53 provides that an application for judicial review is to be made within 3 months from the date when the right to review first accrues where the relief sought is an order for certiorari. Since the Appellant had sought ex parte leave, the court was entitled to consider the merits of the leave application simultaneously when considering the substantive case to decide if leave for review should be granted.
- [9] When seeking review at the High Court the Appellant continued to maintain that the Director did not have the authority under the Act to make allegations or lay charges against the Appellant as he did on 18 September 2001.
- [10] In order to examine the Appellant's allegations, it is necessary to examine whether there was statutory power to discipline provided in the Act and whether this power was transferred by the Commission to the Director, and if so, how and when it was transferred to the Director?

Action by the Director of Immigration

- [11] On 18 September 2001 the Director of Immigration filed allegations of misconduct against the Appellant and referred the charges to the Public Service Commission. At the Commission hearing, the Director gave evidence concerning the charges which were heard by the members of the Commission. The particulars of charges prepared by the Director are annexed to the affidavit of Joe Bisavakauca, sworn the 11 July, 2004.
- [12] The thrust of the Appellant's argument is that if the right to 'discipline' was not included in the Legal Notice 102/99, therefore, it would be impossible for the Commission to delegate that power. On this basis the Appellant claims that the action taken by the Director against the Appellant is ultra vires the powers of the Commission.

Allegations at the Commission hearing -12 December 2001

[13] The Appellant Mr Mohammed Yunus, swore an affidavit on 9 October, 2003, in which he claims that he was charged in a letter dated 18 September, 2001, by the Director of Immigration in the following terms:-

- (a) *That the Appellant knowingly on 6 August 2001, approved a visa to a prohibited migrant (paragraph 5 of his affidavit) KUANG YUN YAN, contrary to section 15(4) of the Migration Act (Cap 88). The Director claimed that this action was in contravention of Section 6(4) of the Public Service (Conduct of Code) of the Public Service Act 1999.*
- (b) *Secondly, it was alleged by the Director of Immigration that on the 6 August, 2001, the applicant directed a Data entry operator Ms A.M Salabogi to modify the watch list entry against a prohibited migrant, MR. KUANG YUN YAN, thus enabling him to enter Fiji Islands when the applicant did not have the authority to vary the conditions contained therein, without the approval of the Permanent Secretary. The allegation against the Appellant was that he contravened Section 6(4) of the Public service Act.*

[14] On 12 December 2001 the Commission conducted its hearing of the charges against the Appellant. The Appellant was provided due process at the hearing and made submissions to the Commission. On 1 February 2002, the Commission made a determination wherein the Commission found the charges proved against the Appellant and imposed a penalty, downgraded the Appellant and transferred him to the Ministry of Home Affairs. After considering further submissions by the Appellant, the Commission on 14 February 2002, advised the Appellant that it upheld its previous decision.

[15] The Appellant, thereafter, appealed the decision of the Public Service Commission to the Public Service Board.

Appeal to the Public Service Appeals Board; 21/5/02 & 9/7/02.

[16] On 15 February 2002 the Appellant lodged an appeal against the decision of the Commission with the Public Service Appeals Board.

- [17] On 21 May & 9 July, 2002, the Appellant's appeal was heard by the Public Service Appeals Board. At this hearing, the Appellant did not dispute or challenge any of the findings of the Commission but admitted the charges and accepted his guilt. From the documents filed and submissions made, it is apparent that the Appellant did not make any complaint to the Board that he was denied natural justice at the Commission hearing. In his notice of grounds of appeal to the Board the Appellant did not raise any issue that he was denied procedural fairness or was prevented from submitting his evidence either at the Commission or at the Board hearings, where the Appellant was represented by his counsel Mr. D. Sharma.
- [18] On 24 July 2002, after hearing the appeal, the Appeals Board upheld the findings of the Commission. The Appellant was advised of the Board's decision and was subsequently down graded and transferred to the Ministry of Home Office.
- [19] We are not acquainted with the details and particulars of matters the Appellant sought in his review at the Appeals Board, however, the critical issue for him was that if he intended to seek judicial review he should have applied for a review of the Appeal Board's decision and not the decision of the Commission.

Application to High Court for Judicial Review - 7 September 2005

- [20] On 13 October, 2003 the Appellant filed an ex-parte application seeking leave of the High Court to commence judicial review of the decision of the Public Service Commission, which was handed down by the Commission on 14 February 2002, approximately 20 months out of time as provided in High Court Order 53.
- [21] Thereafter, on 11 June, 2004, the Applicant filed an ex-parte Notice of Motion for judicial review which came before the High Court on 21 June, 2004. It is also to be noted that since leave to proceed with the judicial review was granted

on an ex parte basis, the Respondent did not have the opportunity to argue against granting leave to seek judicial review, contrary to Order 53 of the High Court Rules.

[22] In his review application, before the High Court, despite the Appellant particularising grounds (i) to (vi) as referred to in the judgment of His Lordship, at page 3, the Appellant summarised his grounds of appeal at page 2 of the said decision, as follows:-

- (1) *The decision of the Director of Immigration dated 18 September 2001 to lay disciplinary charges against the Appellant (Annexure 1 in the affidavit of Joseph Brown filed in this Honourable Court on 21 July, 2004).*
- (2) *The decision of the Public Service Commission on 1 February 2002 finding the Appellant guilty of the disciplinary charges (annexure 4 in the affidavit of Joseph Brown filed in this Honourable Court on 21 July 2004).*
- (3) *The decision of the Public Service Commission dated 14 February 2002 wherein the Commission took disciplinary action against the Applicant and reduced his rank and transferred him to the Ministry of Home Affairs. (Annexure 6 in the affidavit of Joseph Brown, filed on 21 July, 2004)*

[23] At the hearing, learned counsel for the Appellant again changed the grounds of appeal and submitted that he was only relying on the following grounds:-

- [a] *Submission at the High Court trial-Director's lack of power to charge the Appellant*
- [b] *Submission – abuse of process*

[24] On 26 April 2005, the review application was heard before His Lordship Mr Justice Pathik. At the hearing before the High Court the Appellant made submissions that he was relying only on one ground of appeal, namely, that the Director did not have the power or the authority to lay charges against the Appellant. We refer to page 4, line 30, where learned counsel stated, "Now this is the only ground we rely on'. His arguments were noted as follows:-

[a] **Submission at High Court trial -Director's lack of power to charge Appellant**

[25] Counsel for the Appellant submitted that Section 147 and 150 of the Constitution provided power to the Commission; delegation of the said powers was to be made to department heads and to the Director by Legal Notices issued under the Public Service Act 1999. Counsel maintained that Legal Notices No 138 and 102 of 1999 are the only applicable notices. He further claimed that these legal notices when examined cumulatively do not contain the disciplinary power; therefore, it could not have been delegated to the Director on 18 September, 2001, the date when the Director charged the Appellant. Learned counsel submitted that Section 20 of the Public Service Act 1999, and the Legal Notices 102, of 1999, 138 of 1999, and Regulation No 22(1) issued under the Public Service Act 1999 did not provide the Director with the statutory power to take any disciplinary action against the Appellant.

[26] At page 2, line 30, of the transcript learned counsel argued that the 'action taken by the Director was ultra vires the Public Service Commission'. In support of his argument, he submitted that Legal Notice 102 of 1999 did not contain the term 'disciplinary provision', therefore, the Commission could not have delegated the said power and authority to the Director.

[27] He argued that if this was found to be correct, then the decision of the Commission and the Board will be null and void. He stated at page 4, line 26, *'In proceedings to lay the disciplinary charges against the Appellant on 18 September 2001 did not have the requisite legal authority, power or jurisdiction to do so under Legal Notice 102/1999 or under any other delegated legislation. Now this is the only ground we rely on.'*

[b] **Submission to the High Court -Abuse of process claim**

[28] At the High Court trial, the Appellant gave an explanation which the Judge did not accept and refused to grant leave out of time.

[29] After the review hearing by the High Court, the Appellant made further oral and written submissions to the court. After considering the whole of the evidence, His Lordship concluded, *“for these reasons, the application for judicial review is dismissed with costs in the sum of \$500.00 to be paid within 21 days”*.

[30] The Appellant now appeals against the decision of the Court.

Appeal to the Fiji Court of Appeal

[31] The Appellant filed several grounds of appeal in his Notice of Appeal to this Court, as follows,

- 1 *The learned Judge erred in law and in fact in holding that the Applicant’s application for judicial review was an ‘abuse of process’ of the Court in all the circumstances.*
- 2 *The learned judge erred in law and in fact in purporting to refuse the Appellant leave to apply for judicial review following substantive hearing of the application for judicial review.*
- 3 *The learned judge erred in law and in fact in not holding that the Director of Immigration in purporting to lay the disciplinary charges against the Appellant on 18th September 2001 did not have the requisite legal authority, power or jurisdiction to do so under Legal Notice No 102 of 1999 or under any other delegated legislation.*
- 4 *That the learned judge erred in law and in fact in making adverse findings of a prejudicial nature against the Appellant personally and thereby failed to properly exercise judicial discretion based on evidence and legal principles.*
- 5 *That the learned Judge erred in law and in fact in not granting the Appellant relief as sought in the judicial review application.*
- 6 *The Appellant reserves the right to amend or file further grounds of appeal upon availability of the records of the proceedings and transcript of the judge’s notes.*

[32] After particularising six grounds in the Notice of Appeal to this court, the Appellant again changed his tactical assault, by asserting in his submission dated

6 March 2007 that he now wishes to rely only on two basic grounds of appeal, namely,

- A *The learned judge erred in law and in fact for holding that the Appellant's application for judicial review was an abuse of process of the court in all the circumstances.*
- B *The learned judge erred in law and in fact in purporting to refuse the appellant leave to apply for judicial review following substantive hearing of the Application for judicial review"*

Appellant's Submission to the Court of Appeal

[33] At the appeal hearing, the Appellant argued:-

- (a) That the trial judge erred holding that the Appellant's application was an abuse of process.
- (b) That the trial judge erred in refusing to grant leave at the conclusion of the substantive trial.
- (c) That the Commission did not delegate power to the Director to discipline officers.

[a] The grounds of appeal - abuse of process:

[34] The question of abuse of process is considered when the applicant in this case made an application for review of the Commission's decision, which was 20 months out of time from the date when his right to appeal first accrued. The High Court Rules Order 53 rule (4) provides that an application for review is to be made within 3 months from the date when the right to review first accrued to the Appellant. After hearing the Appellant's substantive claim, His Lordship Mr Justice Pathik, dismissed the applicant's review application.

[35] First, the Appellant claimed in his submission that His Lordship, erred in law in refusing to grant leave for judicial review after the trial.

[36] We consider that His Lordship correctly exercised his discretion at the end of the substantive trial, when he disallowed the extension of time to seek review, having regard to the fact that the Appellant failed in his substantive application.

[37] Secondly, the question of abuse of process arose in the instant case after the hearing, when all the facts and evidence were presented to the court concerning the nature of the substantive claim. It was only after the evidence was presented to the court, that it became apparent that the Appellant was seeking review of the decision of the Commission, when in fact that decision had been superseded by the Appeals Board's decision dated 24 July, 2002. The Appellant did not join the Appeals Board or seek review of the decision of the Board. After the Commission's decision was reviewed by the Appeals Board, the Appellant was unable to seek review of the first decision of the Commission.

[38] The Appellant had the right to seek review of the decision of the Appeals Board, but he failed to make the Appeals Board a party to his review application. The Appellant was estopped from seeking review of a decision which had already been reviewed by the Board.

[39] However, courts may interfere with findings of fact in a very limited class of case. In *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1947] 2 All E R 680, in dealing with the question of courts reviewing discretionary power granted by Parliament to local authorities, Lord Greene A/R stated at page 682:

"When an executive discretion is entrusted by Parliament to a local authority, what purports to be an exercise of that discretion can only be challenged in the courts in a very limited class of case. It must always be remembered that the court is not a court of appeal. The law recognizes certain principles on which the discretion must be exercised, but within the four corners of those principles the discretion is an absolute one and cannot be questioned in any court of law."

[40] The whole of the Appellant's argument seems to be contradictory, when the Appellant admitted that he was guilty of the charges laid by the Director at the Board hearing, and thereafter argued that the Director did not have the power to

lay disciplinary charges against the Appellant on the relevant date. The right to seek review of the first decision was explained in *R v Secretary of State for the Home Department Ex parte Ssenyonjo Affairs* [1994] Imm. AR 310 where the facts briefly were that the Appellant had first sought review of the decision by the Secretary of the State who after reviewing the evidence had refused to grant refugee status to the Appellant.

[41] Thereafter, the Appellant lodged a further appeal to the Special Adjudicator, who upheld the decision below, thereafter the Appellant again appealed to the Immigration Review Tribunal, which again declined his application.

[42] The Appellant, thereafter sought Judicial Review of the decision of the first decision made by the Secretary of State; however, he did not challenge the subsequent decisions. In his application for judicial review, the High Court stated,

"I take into account also the fact that this applicant, who has exhausted his rights of appeal, does not challenge the adverse decision made by the special adjudicator and the Immigration Appeals Tribunal, but seeks now to challenge the original underlying decision. In my judgment, cases in which it would be right to give leave to challenge the original decision, where the appellate process has been exhausted and unsuccessfully, must be rare indeed" I see nothing to justify my discretion in favour of the applicant . I also take into account of the delay that has been occurred".

[43] In this instant case, the Appellant's application for judicial review was clearly an abuse of process, when the applicant and his legal advisers knew or ought to have known that the Appellant should have filed his application for judicial review within 3 months of the date of the last decision, of the Commission as required by High Court Rules Order 53.

[44] Accordingly, we find that the learned trial judge correctly applied the law when he held that seeking review of the decision of the Commission was an abuse of process, particularly when the applicant was 20 months out of time in his application for review. High Court Rules Order 53 rule (4), states that an

application for judicial review is to be made within 3 months from the date when the appellant's cause of action accrued. In this case, the appellant had the right to seek review of the decision of the Board, but instead, he chose to seek review of the first decision of the Commission.

(b) Refusal to grant leave

[45] This ground is inter-linked with the ground discussed above. In a case where the applicant is seeking judicial review out of time, the courts will generally grant leave to proceed with the review, depending on the outcome of the substantive review, when the question of leave out of time is decided with the decision of the substantive trial. In the instant case, the Appellant was unsuccessful in his application for review; therefore, His Lordship correctly revoked the extension of time after determining the substantive review. His decision was based on High Court Rules Order 53 rule 4 (2) which states, *"In the case of an application for an order for certiorari to remove any judgment, order, conviction or other proceedings for the purpose of quashing it the relevant period for the purpose of paragraph (1) is 3 months after the date of the proceeding."*

[46] A similar provision is provided in the United Kingdom jurisdiction for extension of time to file an application for judicial review. This is provided in the United Kingdom, Pre Action Protocol incorporated in CPR Part 54.5 which provides as follows:

“(1) The claim form must be filled,
(a) promptly and
(b) in any event not later than 3 months after the grounds to make the claim first arose.”

[47] In making further assessment, whether there was an abuse of process when the Appellant filed his application for judicial review, His Lordship considered whether the lapse of over 20 months could be considered reasonable within which the Appellant sought leave to appeal. After considering all the evidence

submitted by the Appellant during the substantive trial, and the reason for delay in seeking the review, His Lordship held that there was no justification for granting leave 20 months out of time, when the Appellant's substantive application was dismissed. The grant of extension of time is explained in the Federal Law Review, Journal see FedL Rev 2002 [FedL Rev 2], Enid Campbell & Mathew Groves discussed that,

"Granting extension of time for hearing Judicial Reviews has been subject to several controversies.

In an extra-judicial speech published in 1986, Sir Harry Woolf (now the Lord Chief Justice) endorsed the sentiments expressed by Lord Diplock in relation to the justification for the relatively short time limit for institution of judicial review proceedings (three months commencing on the date on which grounds for judicial review first arose). 'Delay', he said, 'can cause considerable uncertainty and inconvenience, not only for the respondent authority but members of the public as well.' Some years later the English Law Commission, as part of a general inquiry entitled "Administrative Law Judicial Review and Statutory Appeals", considered the justifications for the relatively short time limits for the institution of judicial review proceedings. Its advice was that the existing time limitation be retained 'to give effect.'

[48] Since the discretion to grant leave to appeal out of time, is within the inherent jurisdiction of the Court, it was incumbent upon the Appellant to submit compelling evidence at the substantive hearing, in order to persuade His Lordship to grant leave out of time to allow review of the decision. But in the instant case the Appellant was seeking review of the wrong decision, therefore, the question for extending time beyond 3 months was considered by His Lordship as abuse of process.

[49] The significance of granting leave to proceed to seek review of the decision was explained by His Lordship Mr. Justice Scott in State v Public Service Commission Ex parte: Olimivia Cagica in High Court Judicial Review No 33 of 1996 21 July, 1997, in the following terms,

"The purpose of obtaining leave before moving for judicial review is to eliminate frivolous vexatious or hopeless applications, made clear by the Fiji Court of Appeal in Harikisun Limited v Dip Singh & Others FCA Reps 96/365. It is at this stage that the court should first consider whether

there has been undue delay in applying for leave [se RHC O 53 r4] although where in-depth consideration of the question of delay is required then such consideration should best be dealt with at the substantive hearing, leave should only be refused in obvious cases on unjustifiable delay"

[50] In our view in the instant case, the learned judge correctly concluded after hearing all the evidence for the review as well as for the application for leave, that the Appellant had failed to justify reasons for the grant of time to seek review after 20 months from the time when his right to review first accrued.

[51] The delay in filing the application for judicial review has been widely canvassed and was further explained by Lord Diplock in *O'Reilly v Mackman* [1983] 2 A C 237, at page 280, who stated,

"The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision of the authority has reached in purported exercise of decision-making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision"

[52] The court is entitled to hear the application for leave to extend time to appeal simultaneously with the substantive trial. This was explained in *Caswell v Dairy Products Quota Tribunal for England & Wales* [1990] 2 A C 738 2 All E R 434, wherein it was emphasised that questions of delay are best dealt with in depth at the substantive hearing and that leave should only be refused in clear cases of unjustifiable delay.

[53] The requirement to file an application for review within the required time was further illustrated by Ackner L J in *R v Stanford-on-Avon District Council & Anor, Ex parte Jackson* 1985 3 ALL E R 768 where he stated,

"... we have concluded that whenever there is a failure to act promptly or within 3 months there is 'undue delay' Accordingly, even though the court may be satisfied in the light of all the circumstances, including the particular position of the applicant, that there is a good reason for that failure, nevertheless the delay, when viewed objectively, remains 'undue

delay'. The court therefore, still retains a discretion to refuse to grant leave for the making of the application or the relief sought on the substantive application on the grounds of undue delay, if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the right of, any person or would be detrimental to good administration".

[54] On the basis of the matters stated above, we find that His Lordship correctly concluded that the judicial review was abuse of process.

(c) **That the Commission did not delegate power to Director to discipline officers?**

[55] Learned counsel for the Appellant submitted that this was the only ground he proposed to rely on. He claimed that since the Director acted ultra vires, the whole of the actions, the charges and the findings of the Commission and the Board are null and void, and ultra vires the Commission.

[56] The application of the meaning of ultra vires was explained in **Howell v Falmouth Boat Construction Co Ltd** 1951 A C 837, in which the House of Lords unequivocally rejected Lord Denning's proposition that "the subject is entitled to rely on" the legality of a government officer's assumption or power. In that case the officer had been given permission to carry out certain repairs to a ship which by law could only be carried out with a written licence. The decision in **Howell** was ultra vires, because that particular decision was not authorised in writing.

[57] In the instant case, the Respondents claim that the right to discipline was provided in the Public Service Act, and there was further statutory provision for the delegation of disciplinary power to the Director which existed before the date when the Appellant was charged. The Respondent's counsel correctly submitted that first, the Commission had the power to deal with disciplinary matters provided in the Public Service Act and secondly, the Commission had the power to delegate such authority to the Director. The Respondent further claimed that the Regulations made pursuant to the said Act, provided the Commission the power to delegate authority to the Director to take the

disciplinary action, which he took against the Appellant. On this basis the Respondent submitted that the Director's actions to lay charges against the Appellant were not ultra vires the Public Service Act 1999 on the date the Appellant was charged by the Director.

[58] Learned counsel for the Appellant made the central issue of his appeal that if the court found that the Director did not have the authority to lay charges against the Appellant, all the subsequent decisions would be invalid.

[59] Counsel for the Appellant argued that since the Commission lacked the power, which was not provided in Legal Notice 102 of 1999, it could not have transferred the power to discipline the Appellant to the Director. His argument centred on the fact that if the term 'disciplinary charge' was not incorporated in Legal Notice 102 of 1999, the Commission could not have delegated it to the Director.

[60] The Respondent submitted that there was a proper delegation of power by the Commission to the Director. Learned counsel referred to Section 16 of the Public Service Act, the Regulations, and the Public Service Circular which stated that the powers of the Director to discipline officers "shall continue until amended by Legal Notice."

[61] In order to examine the delegation of powers under the Constitution and Public Service Act 1999, the Regulations made under the Act, and the Public Service Circulars issued under the Regulations, it is important to analyse the source of the power and the process by which it was delegated to the Director and to other managers of departments under the Public Service Act.

[i] The Constitutional Frame Work

[62] The source of the power is provided in Section 147 of the Constitution of which incorporates the functions of the Public Service Commission. Section 150

empowers the Public Service Commission to delegate its powers to a 'member or officer' in writing.

[ii] How delegation of Power is to be made

[63] The method by which the Public Service Commission can legitimately delegate its statutory powers to its officers and department heads is provided in section 16(1) of the Public Service Act 1999, which came into force on the 19 March 1999. This section states,

"The Public Service Commission may, in writing, delegate to a member or officer of the Commission, or the holder of a Public Service Office (within the meaning of the Constitution), any of its statutory functions or its powers in relation to its statutory functions,"

[64] Furthermore, Section 20(1) of the Public Service Act 1999 also provides that the Commission can give written directions to managers, department heads and secretaries, and officers of the Commission which are to be issued by Public Service Circulars. The section provides as follows:

"A Service Commission may give to relevant employees written directions about anything necessary or convenient to be prescribed for carrying out its constitutional functions or its statutory functions, or for the efficient, effective and economical management, control and working of the public service. A Public Service Circular issued by the Public Service Commission is considered to be a statutory direction under this Act."

[iii] Delegation of power to the Director to discipline officers

[65] The Public Service Act was enacted on 19 March 1999. After that date this legislation and the Regulations made under this Act became applicable law. The Appellant was charged on 18 September, 2001, when the provisions of the Public Service Act and the Regulations, and the Public Service Circulars were approved under the Act and the Regulations. The Director had acquired the statutory authority to deal with disciplinary matters within his department

eighteen months prior to the date when the Director reported the Appellant's misconduct to the Commission.

- [66] The Public Service Act 1999 provides the code of conduct applicable to the officers provided in Sections 6 and 7. This section is applicable when the Director is required to discipline an officer in his department. The power to discipline officers was delegated to the Director by issue of written directions issued by the Commission under Section 20(1) of the Public Service Act.
- [67] The transfer of statutory power was made to the Director and to the heads of department in the Public Service Circular 29/99 under paragraph 6(ii) of the said document.
- [68] The provisions in regulation 29, made pursuant to the Public Service Act 1999, provides that written directions or instructions to be given under Section 20 of the Act which is deemed to have been communicated to a employee when the direction is published in the Public Service Circular.
- [69] Under Public Service Circular issued No 29/1999 issued on 22 July, 1999, under the heading of 'Delegation of Public Service Commission Powers', Legal Notice 138/1999, provides as follows:-
- "Paragraph 6 (ii) the power was vested in writing to the Heads of Departments to continue to deal with disciplinary matters within their departments until it is replaced".*
- [70] The Public Service Circulars issued under the regulations are statutory documents, and as such they give a clear delegation of the Commission's powers to the Director to take disciplinary actions against officers and to refer complaints to the Commission.
- [71] Regulation 29 provides firm written directions or instructions issued under Section 20 of the Act in the following terms:

“such directions are deemed to have been communicated to an employee when the direction is published in the public service circular, failing any such publication, when it has otherwise been brought to the personal notice of the employee”.

[72] We find that the Commission legitimately delegated its powers to deal with disciplinary matters such delegation was made by the Commission under the Public Service Act 1999. It is clear from above that on 18 September, 2001, the Director had the statutory power to charge the Appellant as he did when he referred the matter to the Public Service Commission for hearing.

[73] The operation of Regulation 22 (1) only arises after the Commission has heard the charges against an officer, when the Commission considers the nature of punishment to be imposed only after an officer has been found guilty of a charge. It is in the following terms:-

Regulation 22 (1) “If the Commission is satisfied that the employee has breached the Public Service Code of Conduct, the Commission may:-

- (a) terminate the employee’s employment,*
- (b) reduce the employee’s grade*
- (c) transfer or redeploy the employee to other duties;*
- (d) defer a merit increase in remuneration for the employee for a specified period ;*
- (e) reduce the level of the employee’s remuneration;*
- (f) impose a penalty of not more than \$500; or*
- (g) reprimand the employee.*

[74] Therefore, learned counsel for the Appellant’s assertion that the Director did not have the power to report the Appellant to the Commission clearly is misconceived.

[75] There is a clear demarcation between the authority of reporting misconduct and hearing of charges by the Commission. In this case, the Director merely lodged a complaint against the Appellant to the Commission.

[76] Therefore the Appellant's claim that the Director did not have the power to discipline the Appellant on 18 September 2001 is without any legal basis.

Conclusion

[77] [1] We find that His Lordship correctly concluded that there was an abuse of process, after considering the whole of the evidence submitted by the Appellant and the Respondent, at the review trial when it became evident that the Appellant was seeking review of the Commission's decision, which was appealed to the Appeals Board, was abuse of process.

[2] His Lordship correctly applied the principles when he concluded that it was abuse of process when the Appellant was seeking judicial review 20 months out of time from the date of filing the application when the Appellant failed to submit cogent reasons for the delay in filing his application.

[3] We further find that there are existing statutory provisions contained in the Public Service Act 1999, and the Regulations made under the said Act, whereby the Commission had the power to discipline officers, which it transferred to the Director of the Immigration to discipline officers.


[4] On the basis of the above findings, we do not find that the actions of the Director were ultra vires the Commission's powers.

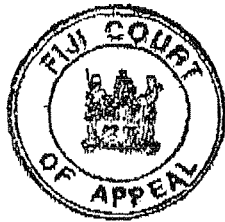
[5] We find that the Public Service Circulars, issued under the Act gave legitimate powers to the Director to lay charges against the appellant as he did.

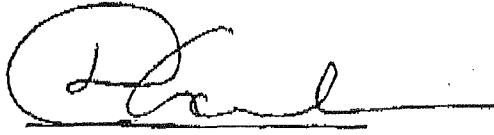
[78] In the circumstances all the grounds of the appeal fail.

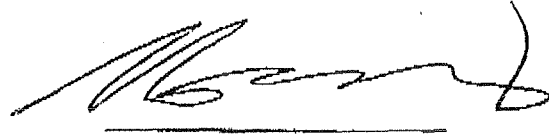
ORDERS

[79] Appeal dismissed, the Appellant to pay Respondent's costs in the sum of \$1,500.00.


Byrne, JA




Goundar, JA


Datt, JA

Solicitors:

Patel Sharma and Associates, Suva for the Appellant
Office of the Attorney General's Chambers, Suva for the Respondent

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