AG's

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

CIVIL APPEAL NO. ABU0003 OF 2007S
(High Court Civil Action No. HBJ 03 of 2007S)

BETWEEN: PUBLIC SERVICE COMMISSION
First Appellant

ATTORNEY-GENERAL OF FIJI
Second Appellant

AND: FIJIAN TEACHERS ASSOCIATION
First Respondent

FIJI PUBLIC SERVICE ASSOCIATION
Second Respondent

Coram: Byrne, JA
Bruce, JA
Khan, JA

Hearing: Friday, 21st November, 2008, Suva

Counsel:

S. Sharma	]	
M. Rakuita	]	for the First and Second Appellants
Ratu J. Madraiwiwi	]	for the First Respondent
H. Nagin	]	for the Second Respondent

Date of Judgment: Wednesday, 11th March 2009, Suva

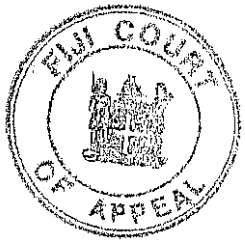
JUDGMENT OF THE COURT

BYRNE, JA

[1] I agree with the judgment which Khan JA is about to deliver and the orders he proposes but in view of the fact that opposition to discrimination has become more prominent in the last fifty years I wish to add a few words of my own.

[2] I believe that the people of Fiji, through their representatives who drafted the 1997 Constitution showed considerable common sense in including in it Section 38(7). As a matter of practicality there must be some exceptions to sub-sections (1), (2) and (3) which do not denigrate from the general principle of equality before the law.

[3] I also agree with the remarks of Bruce JA in paragraphs (42) and (43) of his judgment that the full scope of sub-section (7) has yet to be determined and that it would be inappropriate for this Court to embark on such an exercise in the absence of full argument.



Byrne, J.A.

BRUCE, JA

Introduction

[1] I respectfully concur with the result judgments of Byrne J.A. and Khan JA. However, the route by which I arrive at that conclusion is different (sometimes only subtly different) from that of Byrne J.A. and Khan JA. The principal difference between their judgments and my own is that I am of the view that section 38 of the Constitution is engaged. I have come to the view that while that section is engaged, to the extent that the relevant regulation violates the guarantees in section 38, (which is open for debate - a debate which is not resolved in this judgment), even if it does violate those guarantees, it is plainly justified within the meaning of section 38(7).

[2] The Public Service (General) Retirement Age – Amendment) Regulations 2007 ("Regulation") was made by the Public Service Commission ("PSC"). Clause 2 of the Regulation has the effect of reducing the compulsory retirement age of officers in the public service of Fiji from 60 years of age to 55.

[3] The Fijian Teachers Association and the Fiji Public Service Association instituted proceedings by judicial review seeking a declaration which had the effect of challenging the decision of the PSC to reduce the retirement age. Jitoko J in a

judgment delivered on 20 December 2007 quashed the decision of the Public Service Commission ("PSC") to reduce the retirement age for the public servants from 60 to 55 years. The essence of the grounds upon which Jitoko J came to this conclusion were:

(a) that the PSC had acted in breach of section 38 of the Constitution which protected an individual from discrimination on the basis of age;

(b) that the PSC had failed to satisfy the requirement that the decision of the PSC was "reasonable and justifiable in a free and democratic society" which would have excepted the decision under section 38(7) as permissible; and

(c) that there had been a failure of consultation and referral of the matter to arbitration as a trade dispute resulting in the breach of the principles of natural justice, particularly legitimate expectation of the respondents.

Arguments on appeal

[4] The appellants have argued this appeal essentially on two grounds:

(1) That the PSC had the Constitutional right to make regulations for the reduction in retirement age of public servants and alternatively, that the PSC had met the requirement of fairness and legitimate expectations by conducting proper consultations with the representatives of the public servants; and

(2) that the compulsory reduction of the retirement age from 60 to 55 years was not discriminatory and therefore, there was no breach of the provisions of section 38(2) of the Constitution.

[5] It was argued on behalf of the appellants that section 147(1)(b) as interpreted by section 194(5) reposed in the PSC the discretionary power to pass a regulation to remove persons from public offices by requiring or permitting them to retire from office. It was argued that section 173(1) allowed the PSC to regulate and facilitate the performance of its functions by the making of regulations. The Appellants further supported this argument by reference to section 15(2)(c) of the Public Service Act 1999 which provides for the passage of regulations by the PSC with respect to retirement of a public servant.

[6] In essence, the appellants argued that the validity of the exercise of the aforementioned functions and powers of the PSC had not been successfully challenged by the respondents in the hearing before Jitoko J.

[7] That being so, they argue that as the compulsory change in the retirement age brought about by the PSC pursuant to Clause 2 of the Regulation had not been challenged at all before Jitoko J. The Appellants contend that the reduction of the retirement age from 60 to 55 was perfectly legitimate and questions of failure to satisfy the requirements of legitimate expectations, consultations and/or any other requirement of a fair hearing nor of any discrimination under section 38(2) of the Constitution do not arise.

The power to retire public servants

[8] The relevant parts of the Constitution are set out below. Section 147(1) provides that the PSC has amongst others the following function:

> (b) To remove persons from public offices

[9] Further, section 173(1) provides:

> A Commission may by regulation make provision for regulating and facilitating the performance of its functions.

[10] Section 194(5) provides:

> A reference in this Constitution to a power to remove a person from public office includes a reference to:
>
> (a) a power to require or permit the person to retire from office.

[11] Section 15(1) of the Public Service Act 1999 gives a general power to make regulations with the agreement of the Prime Minister. Section 15(2) of that Act provides specific powers to augment or make plain what the content of section 151) includes. Section 15(2) provides:

> Without limiting subsection (1), regulations made under it may make provision with respect to (c) the retirement, retrenchment and termination of employment of all employees.

Subsection (1) deals with the PSC's regulation making power in agreement with the Prime Minister in more general terms.

[12] The issue of the validity of the amendment to the retirement age by the making of the Regulation was argued on a narrow or limited basis before Jitoko J who dealt with it in his judgment from page 7 to page 10. The first respondent had raised the argument that the PSC did not have the lawful authority to lower the retirement age to 55 because the Cabinet was not constituted in accordance with the Constitution. Specifically, it was argued that a democratically elected multi-party cabinet under section 99 of the Constitution was not in place. As the judge said at pages 7 and 8:

> The crux of the argument is that the decision is an executive one which can only be made by the Minister albeit through Cabinet and given that the Minister and/or Cabinet were appointed and exist outside the Constitution they are not lawful appointments and decisions emanating therefrom are invalid.

[13] Heavy reliance was placed by the respondents on the Privy Council decision in ***Bribery Commissioner v. Pedrick Ranasinghe*** [1964] UKPC 1 where the defendant was prosecuted for a bribery offence by the Bribery Tribunal when he was convicted and sentenced to a term of imprisonment and a fine. On appeal, the Supreme Court of Ceylon declared the conviction and orders made against the defendant, null and inoperative on the ground that the persons composing the Tribunal which tried him were not lawfully appointed. The Commissioner appealed to the Privy Council which dismissed the appeal and upheld the decision of the Supreme Court.

[14] The trial judge then proceeded to discuss the powers given to the PSC by sections 147, 173 and 194 of the Constitution and section 15 of the Public Service Act 1999.

[15] On page 10 of his judgment, Jitoko J, after discussing these provisions, concluded:

> "The Court therefore agrees with counsel for the respondent's [appellants in this case] that the lowering of compulsory retirement age by the 2007 Regulation is the exercise of powers by the Commission prescribed to it by the Constitution and 1999 Act."

The learned judge disagreed with the argument that the Cabinet had made the decision and said on page 10:

> "This Court has already found that the decision in question was made by the Commission pursuant to its powers under section 15(1) of the Act not the Cabinet."

[16] Out of an abundance of caution, His Lordship then proceeded to reject the exercise of powers by the illegal Cabinet argument raised by the first respondent. I join with Byrne JA and Khan JA in agreeing with Jitoko J in this respect.

[17] Jitoko J then went directly to a discussion of the question whether the decision to impose a compulsory retirement age reduction from 60 to 55 was in breach of the provisions of section 38(2) of the Constitution. I will return to this issue shortly.

[18] What appears to have been under attack in this case is (see application for judicial review dated 14 March 2007):

(a) the decision of the PSC to make these regulations; and

(b) The validity of the regulations by reference to section 38(2) of the Constitution.

It is not said that regulations prescribing a compulsory retirement age are not regulations which could be made under the Constitution and the Public Service Act 1999 and, in that sense, it is not contended that the Regulation is outside the power of the PSC to make such a regulation. It is also not said that the Regulation is void and outside the regulation-making power of the PSC because, for example, the regulation is uncertain; so unreasonable that the framers of the Constitution and the legislature in enacting the Public Service Act 1999 could not have intended that the powers to make delegated legislation be exercised so unreasonably or on any of the other bases upon which the courts might scrutinise delegated legislation via judicial review. There is no evidence that the procedures for making the delegated legislation were not followed.

[19] Against that background, given that the delegated legislation has been actually made, the application for judicial review of the decision to make the Regulation is, in some respects, otiose. However, in spite of that it is right to examine the Regulation against the submissions of the parties.

Power to make the Regulation

Constitutional provisions

[20] In essence, the Respondents contend that in exercising its powers the PSC is subject to other parts of the Constitution. They argued that the decision to make (and thus the making of) the Regulation by the PSC to lower the compulsory retirement age from 60 to 55 was incompatible with section 38 of the Constitution. In particular, section 38(2) provides:

> (2) A person must not be unfairly discriminated against directly or indirectly, on the ground of his or her:
>
> (a) actual or supposed personal characteristics or circumstances including race, ethnic origin, colour, place of origin, gender, sexual orientation, birth, primary language, economic status, age or disability;
>
> (b) opinion or beliefs, except to the extent that those opinions or beliefs involve harm to others or the diminution or the rights or freedoms of others.
>
> Or any other ground prohibited by this Constitution.

[21] For the purposes of the present case, the case for the Respondents is that the effect of the Regulation is to unfairly discriminate against a person employed in the Public Service on the ground of his or her age.

[22] Section 38(7) of the Constitution is also of high relevance and it provides:

> (7) A law is not inconsistent with subsection (1), (2) and (3) on the ground that it:
>
> (a) .....
>
> (b) imposes a retirement age on a person who is the holder of a public office
>
> but only to the extent that the law is reasonable and justifiable in a free and democratic society."

Section 38(7) is plainly meant to deal with circumstances in which the imposition of a retirement age on the holder of a public office violates section 38(2). Section 38(7) is only engaged if there is such a violation. The arguments before us assumed there was such a violation. The learned judge below made the same assumption. While I proceed to deal with that argument on that basis, it is noted that it may well be open to contend that section 38(7) is not engaged because section 38(2) only deals with a person who is *unfairly* discriminated against. There may be a distinction between unfair discrimination and discrimination which is not unfair. The arguments of the parties on this topic virtually assume that the discrimination was unfair. It may be open to argue that to impose a compulsory retirement age on all public servants is not unfair discrimination on the basis of age. If the matter had been argued under section 38(2), it may have been open to the PSC to contend that given that this is not about the imposition of a retirement age from the outset but rather whether it should be at age 55 as opposed to 60, there is nothing unfair about the regulation. That may be even more so given that the PSC is empowered to re-employ certain of those who are compulsorily retired where there is clear merit in doing so. This issue was not engaged in this case and the matter is left for further consideration in future cases.

[23] However, before the issue of whether section 38(2) of the Constitution has been violated arises, it is right to note that while it is true that one of the constitutionally recognised functions of the PSC is to impose compulsory retirement, that must be done subject to the Constitution and in particular section 38 of the Constitution. It would require very clear words to oust provisions such as section 38. Indeed, it is plainly implicit in section 38(7) that in compulsory retirement matters, whether in relation to an individual or by way of general regulation such as is the subject of this appeal, that at least the equality guarantees in section 38(1), (2) and (3) are preserved. That would be so regardless of whether the regulations were made under the Constitution or under section 15 of the *Public Service Act 1999*.

[24] If the issue was whether this was unfair discrimination under section 38(2), the onus of proof would be on those who seek to invoke the provision. However, if the basis

for argument is that section 38(2) is violated and it is then a matter whether the provision is saved under section 38(7), the onus of proof would be on the party who seeks to justify the invocation of that section. In the result, perhaps fortunately, for reasons which will shortly appear, in the present case that does not matter greatly.

[25] The appellants have argued that the compulsory reduction of the retirement age from 60 to 55 was justified via the exception provided for in section 38(7) in that it was reasonable and justifiable in a free and democratic society. The fact that it might be argued that democracy is *at present* not a feature of Fijian politics is not relevant for present purposes. The correct view is that "free and democratic society" in section 38(7) means that the measure of constitutionality is a society with the character of a free and democratic society. While that might be said to be an artificial element to that, that is what is appropriate in the present circumstances.

[26] Jitoko J was taken to a number of Canadian decisions by the respondents. His general view was said at p.16 to be:

> "The Court has now had the opportunity to look at the Canadian Courts judgments referred to by the respondents. They have distinguishable characters. Most involved universities or hospitals. They are by and large autonomous and do not form part of "government" under their Charter or Rights and their employees would therefore not be holders of "public office" as defined under s.38(7) of our Constitution. The most important factor distinguishing the relevant Canadian cases, is the existence already of a collective agreement between the institution and their employees. These agreements which included the compulsory retirement age, had been negotiated either personally or through respective organisation. The compulsory retirement age was not a condition imposed on their employees but they derived from negotiations and arrangements between the parties. It was the individual and staff member of these institutions that sought to challenge the provision of compulsory retirement age of 65."

[27] This is an important factor when considering whether His Lordship was correct in regarding collective bargaining as an essential prerequisite to the amendment to retirement age. It is equally obvious, that he viewed, the reduction of the retirement age from 60 to 55 as a unilateral act by the PSC who merely informed the unions as to what it had done.

[28] Jitoko J referred at p.17 of his judgment to Dickson CJC in the case of ***R v Edward Book and Arts Ltd*** (1986) 35 DLR (4d) 1 at 41 where His Honour said:

> "Two requirements must be satisfied that a limit is reasonable and demonstrably justified in a free and democratic society. First the legislative objective which the limitation is designed to promote must be of sufficient importance to warrant overriding a Constitutional right. It must bear on a "pressing and substantial concern". Secondly the means chosen to obtain those objectives must be proportional or appropriate to the ends. The proportionality requirement in turn, normally, designed, or rationally connected, to the objective, they must impair rights as little as possible; and their effects must not severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgement of right."

[29] Jitoko J went on to analyse what the "pressing and substantial concern" of the appellants was in this case. He said on page 17:

> "In this case the respondents "pressing and substantial concern" that they rely on to justify the curtailment of the employees rights under s.37 are the reduction of operation costs to compulsory redundancy of employees and the resultant increase in funds for the capital expenditure from the savings in salaries and wages of redundant employees through the imposed lowering of retirement age to 55. In addition, the respondents say that the policy is intended to assist the unemployed especially the undergraduates find the employment replacing those retiring. It was also the opportunity "to restructure" the Public Service. The affidavits of the Secretary of the Public Service Commission, Ms Taina Tagicakibau, and Agni Deo Singh the General Secretary of the Fiji Teachers Union ("FTU") are filed by the respondents to support this policy consideration."

[30] It is clear that Jitoko J proceeded on the basis that the phrase "pressing and substantial concern" which appears in the passage from Dickson CJC quoted above is synonymous with "reasonable and justifiable in a free and democratic society" in section 38(7).

[31] The ***Edward Book Case*** where Dickson CJC referred to a "pressing and substantial concern" involved the validity of a law which prohibited trading on a Sunday. The case dealt with the question whether such a law interfered with religious freedom. It was in that context that Dickson CJC used the phrase "pressing and substantial concern". The words in section 38(7) are: "reasonable and justifiable in a free a

democratic society". Whether there is any difference in content between the concept of a "pressing and substantial concern" and what is "reasonable and justifiable in a free a democratic society" was not the subject of submissions before this Court. Doubtless there is a substantial overlap between the concepts. The scope of that overlap is an issue that will have to be considered and decided in future cases. In the result, it was not crucial in the present case.

[32] Aside from a number of Canadian decisions to which the attention of this Court was drawn, neither counsel appearing for the appellants nor for the respondents referred to any authority touching on the manner in which this court should interpret the words contained in section 38(7). The interpretation of section 38(7) is a matter of fundamental importance in the development of constitutional jurisprudence in this Country and in the absence of full argument on this topic, it is not appropriate to express a concluded view on the scope and meaning of section 38(7). The judgment of Khan JA recognises as much and I agree with him in that regard. I gratefully recognise the research undertaken by Khan JA and record that, for my part, these and many other judgments considering like (or approximately like) constitutional provisions elsewhere may provide substantial inspiration and assistance in making a fuller determination of the impact of sections 38(2) and (7). However, for reasons which will shortly appear, I am of the view that the legislation does not fall foul of section 38(2) of the Constitution.

[33] It is not as if changes in the compulsory retirement age for public servants in Fiji are unheard of. There have been two in the past 30 years. In addition to the two previous changes in the retirement age, I note that the conditions upon which a public servant is engaged as an employee of the government very clearly state that government is entitled to change the conditions of work at its own discretion: see p.2 of the trial judge's judgment where he sets out these matters.

[34] In her affidavit of 26 September 2007, Ms Tagicakibau outlined certain advantages that would be gained by the reduction of the retirement age from 60 to 55. She stated in paragraph 15 that the government would save $79,519,530.00 when the

reduction in retirement age policy came into effect from 1st January 2009. She went on to say in paragraph 16 that if posts were filled selectively according to areas of need, government would save up to $10,455,610.00 when this policy is put into effect. In paragraph 18 she made the point that this policy would also enable the government to restructure the civil service and reduce operational costs.

[35] In his affidavit of 21 September 2007 Agni Deo Singh, the General Secretary of the Fiji Teachers Union ("FTU") said in paragraph 7 that his union the FTU favoured the retirement age to be 55 and not 60 and then he gave reasons why the retirement age of 55 was preferable to that at 60. He said in paragraph 8 "By the age of 55 years, civil servants have worked for at least 30 years and are expected to have met all obligations in relation to their children in terms of education etc." Then in paragraph 9 he said that civil servants like all workers in Fiji were eligible for retirement benefits at the age of 55 years. They might take this in a lump sum and start a business on their own or receive it by way of fortnightly pensions.

[36] Agni Deo Singh then went on to make the point that the retirement of civil servants at 55 would open the opportunities for young graduates to join the civil service. He said this in paragraph 10:

> There are over 2,000 graduates who are unemployed. 800 of these are qualified teachers. A large number of these 800 qualified teachers would have been trained by government at the Advance College of Education and Lautoka Teachers College or at the USP on a scholarship. A large number of these unemployed graduates are sons and daughters of poor people who would have taken loans for education for their children. Government employment becomes the last and sometimes only avenue for employment because of the limited opportunity for employment in the private sector.

[37] The evidence of Agni Deo Singh clearly supports the evidence of Ms Tagicakibau. It would be reasonable to expect that both of them would speak with authority and experience when they said in their affidavits that certain advantages relating to savings and job creation would flow from the reduction in the retirement age from 60 to 55.

[38] I agree with Byrne JA and Khan JA that the learned trial Judge did not give sufficient weight to the evidence of Ms Tagicakibau and Agni Deo Singh in relation to the advantages which would be gained by the reduction in the retirement age from 60 to 55. Although the advantages to be gained by such a change in the retirement age, were, in some respects, bold assertions by Ms Tagicakibau, Jitoko J should have given substantially more consideration and weight to this evidence, particularly, as there was no cross examination and to an appreciable extent it was supported by the evidence of Agni Deo Singh.

[39] In relation to the evidence of Agni Deo Singh, Jitoko J had this to say on pages 19 and 20:

> "Both the respondents and Agni Deo Singh on behalf of FTU lay great emphasis on employment of undergraduates and the need to implement the new 55 compulsory retirement age as a way of reducing the unemployment. Mr Singh estimates the number of undergraduates as over 2,000 with 800 qualified teachers amongst them. In Mr Singh's submission, many of the government employees that will be affected would have served for at least 30 years and at 55 they are eligible for their FNPF contributions which he suggested that "they may take this as a lump sum and start a business of their own or receive it by way of fortnightly pensions". This argument I must say lacks any merits whatsoever. First as the Applicant's make clear not all employees would have served at least 30 years in the service. Not all employees have accumulated enough FNPF funds at 55 to retire or start their own business or come under a suitable pensionable scheme. In any case the fact that not everyone will be in the same position, is discriminatory of itself."

I join with Byrne JA and Khan JA in disagreeing with this conclusion. The rejection of the PSC's argument by the trial judge was without foundation because he had no evidence upon which he could decide the extent to which the public servants would have served 30 years and secondly, there was no evidence to determine the extent to which the public servants would have accumulated enough FNPF funds at 55 to retire and start their own business. In contra-distinction to this, the trial judge had the evidence of Ms Tagicakibau and Agni Deo Singh to the effect that the reduction in the retirement age would bring about benefits to the public servants as outlined by them in their affidavits. They were not cross-examined on their affidavits and their evidence.

[40] After dismissing other arguments of the appellants relating to productivity and restructuring he went on to hold as follows at page 22:

> "It is evident from the court's view expressed above that the objective of the policy decision resulting in the Public Service (General) Retirement age – (Amendment) 2007 do not meet the threshold requirement of what is reasonable and justifiable in a democratic society. "The policy may be said to further a substantial objective of creating an employment for their unemployed and at the same time reducing some costs to government, but, it is, in the view of this Court, neither proportionate nor rationally connected to the objectives to be accomplished. In the result, this court finds that the application of the exception to equality as to age provided for s.38(7)(b) of the Constitution and argued by the respondents cannot be sustained. The decision is not one that can be said is reasonable and justifiable in a democratic society. That being so, it follows that the decision is in breach of s.38 of the Constitution."

[41] An analysis of the evidence of Ms Tagicakibau and Agni Deo Singh supports the case for the Appellant. I respectfully disagree with his Lordship's conclusion that the appellant had failed to satisfy the test in the exception under subsection (7). I am of the view that the PSC's act in making the Regulation was "reasonable and justifiable in a democratic society" in the light of the evidence of Ms Tagicakibau and Mr Singh.

Conclusion

[42] It is right to re-emphasise that the full scope of section 38(7) should not be definitively stated by this Court in the absence of full argument. Nevertheless, assuming section 38(7) is engaged, the requirements of that provision were clearly established. It is relevant to note that compulsory retirement for civil servants has been established in Fiji for many years. The date for such retirement has varied from time to time. The case under consideration in the present circumstances is not whether to impose compulsory retirement. The argument is about whether it should be imposed at age 55 as opposed 60.

[43] Further, compulsory retirement is a feature of the management of civil servants in many, if not most, civil services in the world. There is variation as between civil services in different countries as to the date of compulsory retirement but that is a matter for the judgement for the individual countries. Underlying such a policy is an element of the desirability of renewal and the importation of fresh ideas and fresh vigour through the injection of new personnel into the organisations that serve our community. Not everyone will agree with decisions about such matters. No one could doubt that many civil servants over the age of 55 years may have much by way of knowledge and experience (and, indeed, vigour) to contribute to public service in Fiji. The same may be said for those over the age of 60. Further, it may be that a wide margin of appreciation must be accorded to those who formulate policy in these matters. Those who have formulated the policy have sought to explain it by affidavit and the evidence thus supplied was not only uncontested by contrary evidence but was supported in material respects. Regardless of where the burden of proof lies in this matter, the requirements of section 38(7) are established. It may be that whether or not the discrimination was established to be unfair within the meaning of section 38(2) is open for debate. The reasons advanced in the evidence may well have established that while some would have lost out by the decision to change from a retirement age of 60 to one of 55 given the benefits they enjoyed, and this does not render the decision one which amounts to unfair discrimination by reference to age.

Legitimate expectation: no change without consultation

[44] I am in complete and respectful agreement with the observations of Byrne JA and Khan JA in relation to this topic.

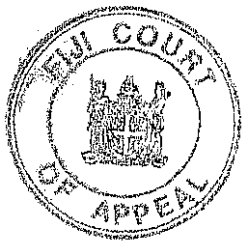
Orders

[45] I propose the following orders:

(1) Appeal allowed;

(2) The declaration of Jitoko J that the PSC's decision of 9th March, 2007 was null and void is quashed; and

(3) The respondents shall pay the appellants' costs assessed at $3,500.00.



Bruce, JA

KHAN, JA

Introduction

[1] The Public Service Commission and the Attorney General of Fiji have appealed to this Court against the decision of Jitoko J delivered on 20 December 2007 quashing the decision of the Public Service Commission ("PSC") to reduce the retirement age for the public servants from 60 to 55 years on a number grounds. They were: (a) that the PSC had acted in breach of s.38 of the 1997 Constitution ("Constitution") which protected an individual from discrimination on the basis of age, (b) that the PSC had failed to satisfy the requirement that the decision of the PSC was "reasonable and justifiable in a free democratic society" which would have excepted the decision under s.38(7) as permissible and (c) that there had been a failure of consultation and referral of the matter to arbitration as a trade dispute

resulting in the breach of the principles of natural justice, particularly legitimate expectation of the respondents.

[2] Hereinafter, the Public Service Commission and the Attorney General of Fiji will be referred as the appellants and the Fijian Teachers Association and the Fiji Public Service Association will be referred to as the respondents throughout this judgment.

[3] The appellants have argued this appeal essentially on two grounds: (1)That the PSC had the Constitutional right to enact regulations for the reduction in retirement age of public servants and alternatively to that, the PSC had met the requirement of fairness and legitimate expectations by conducting proper consultations with the representatives of the public servants and (2) the compulsory reduction of the retirement age from 60 to 55 years was not discriminatory and therefore, there was no breach of the provisions of s..38(2) of the Constitution.

[4] Thus the issues for the Court's decision could to be first, whether the PSC has the entitlement to enact regulations pursuant to s.173(1) of the Constitutions for the compulsory reduction in the retirement age of public servants and if so, whether such an enactment was reviewable by the Court under the principles of judicial review, secondly, if our answer is against the PSC in respect of the first question, whether the PSC had discharged its duties of fairness and legitimate expectations by proper consultations with the public servants before it reduced the retirement age from 60 to 55 years and thirdly, whether such a reduction was contrary to the provisions of s.38(2) of the Constitution.

[5] It was argued on behalf of the appellants that s.147(1)(b) as interpreted by s.194(5) reposed in the PSC the discretionary power to pass a regulation to remove persons from public offices by requiring or permitting them to retire from office. It was argued that s.173(1) allowed the PSC to regulate and facilitate the performance of its functions by the enactment of regulations. They further supported this argument

by reference to s.15(2)(c) of the ***Public Service Act 1999*** which provides for the passage of regulations by the PSC with respect to retirement of a public servant.

[6] In essence, the appellants argued that the validity of the exercise of the aforementioned functions and powers of the PSC had not been successfully challenged by the respondents in the hearing before Jitoko J.

[7] That being so, they argue that the compulsory change in the retirement age brought about by the PSC by Clause 2 of ***the Public Service (General) Retirement Age – Amendment) Regulations 2007*** ("Regulation") had not been challenged at all before Jitoko J the reduction of the retirement age from 60 to 55 was perfectly legitimate and no questions of failure to satisfy the requirements of legitimate expectations, consultations and/or any other requirement of a fair hearing nor of any discrimination under s.38(2) of the Constitution arise.

[8] For ease of reference and better understanding of the arguments, it is convenient to set out the relevant parts of the above-mentioned statutory provisions as follows:

Section 147(1) provides that the PSC has ***inter alia*** the following function:

> ***(b) To remove persons from public offices***

[9] Section 173(1) provides:

> ***"A Commission may by regulation make provision for regulating and facilitating the performance of its functions."***

Section 194(5) of the Constitution provides:

> ***"A reference in this Constitution to a power to remove a person from public office includes a reference to:***
>
> ***(a) a power to require or permit the person to retire from office."***

Section 15(2) of the ***Public Service Act 1999*** provides:

> ***"Without limiting subsection (1), regulations made under it may make provision with respect to***
>
> ***(c) the retirement, retrenchment and termination of employment of all employees."***

Subsection (1) deals with the PSC's Regulation making power in agreement with the Prime Minister in more general terms.

[10] The issue of the validity of the amendment to the retirement age by the enactment of the Regulation was argued before Jitoko J who dealt with it in his judgment from page 7 to page 10. The first respondent had raised the argument that the PSC did not have the lawful authority to lower the retirement age to 55 because the Cabinet was not constituted in accordance with the Constitution. Specifically, it was argued that a democratically elected multi-party cabinet under s.99 of the Constitution was not in place. As the judge said at pages 7 and 8:

> ***"The crux of the argument is that the decision is an executive one which can only be made by the Minister albeit through Cabinet and given that the Minister and/or Cabinet were appointed and exist outside the Constitution they are not lawful appointments and decision emanating therefrom are invalid."***

[11] Heavy reliance was placed by the respondents on the Privy Council decision in ***Bribery Commissioner v. Pedrick Ranasinghe*** [1964] UKBC 1 where the defendant was prosecuted for the bribery offence by the Bribery Tribunal when he was convicted and sentenced to a term of imprisonment and a fine. On appeal, the Supreme Court of Ceylon declared the conviction and orders made against the defendant, null and inoperative on the ground that the persons composing the Tribunal which tried him were not lawfully appointed. The Commissioner appealed to the Privy Council which dismissed the appeal and upheld the decision of the Supreme Court.

[12] Other than the unconstitutionality argument just mentioned, no evidence or argument was presented by the respondents regarding the regulation making discretionary power given to the PSC by s.173(1) of the Constitution pursuant to which the Regulation had been made reducing the retirement age from 60 to 55.

[13] The trial judge proceeded to discuss the powers given to the PSC by the provisions which we have mentioned above, that is, sections 147, 173 and 194 of the Constitution and section 15 of the ***Public Service Act 1999.***

[14] On page 10 Jitoko J said after discussing these provision:

> ***"The Court therefore agrees with counsel for the respondent's (appellant's in this case that the lowering of compulsory retirement age by the 2007 Regulation is the exercise of powers by the Commission prescribed to it by the Constitution and 1999 Act."***

[15] His Lordship disagreed with the argument that the Cabinet had made the decision and said on page 10:

> ***"This Court has already found that the decision in question was made by the Commission pursuant to its powers under s.15(1) of the Act not the Cabinet."***

[16] His Lordship then proceeded to dismiss the exercise of powers by the illegal Cabinet argument raised by the first respondent.

[17] Then Jitoko J went directly to the discussion of the question whether the compulsory retirement age reduction from 60 to 55 was in breach of the provisions of s.38(2) of the Constitution.

[18] Nothing is mentioned in the judgment, as to why it was necessary to embark on an analysis of the discrimination and other issues without first determining the legality of the enactment of the Regulation by the PSC.

[19] As observed earlier section 173(1) gives the PSC the discretion to make regulations in facilitation of the performance of its functions. It might be convenient to set out here the relevant parts of s.173 as follows:

> "(1) ***a Commission may by regulation make provision for regulating and facilitating the performance of its functions.***
>
> (2) ***A decision of the Commission requires the concurrence of a majority of its members and the Commission may act despite the absence of a member but if, in a particular case a vote is taken to decide a question and the votes cast are equally divided the person presiding must exercise a casting vote.***
>
> (3) ***Subject to this section, a Commission may regulate its own procedure.***
>
> (4) ***In the performance of its functions or the exercise of its powers, a Commission is not subject to the direction or control of any other person or authority except as otherwise provided by the Constitution.***

[20] And it will be recalled that under s.147 these functions of the PSC are outlined. Subsection (1) provides for the removal of persons from public office.

[21] Section 194(5) defines the power to remove a person from a public office as a power to require or permit the person to retire from office.

[22] As I noted earlier, the trial judge did not embark upon any analysis of the legitimacy of the enactment of the Regulation. I consider that he should have analysed and made a decision as to whether or not the Regulation was properly made in accordance with s.173 of the Constitution. If the answer was yes, then there was no need for the judge to move on to the discussion of the other issues.

[23] In dealing with the question of the legitimacy of the enactment of the Regulation by the PSC, we have to proceed on the basis that this was done properly in accordance with the procedures required by s.173(2) of the Constitution as there was no evidence to the contrary.

[24] It is true that a delegated legislation such as the making of the Regulation by a Statutory Body such as the PSC is subject to review unlike a statute passed by the Parliament. The usual basis of review is whether the statutory body was ***ultra vires*** the enabling legislation. Of course, other principles of judicial review such as reasonableness, relevancy and purpose could enable a Court to render a delegated legislation ineffective and therefore any act done pursuant to it equally ineffective.

[25] In the absence of contrary evidence, we hold that the PSC legitimately exercised its discretion under s.173(1) of the Constitution and was well within its functions given to it by s.147(1)(b) in making the Regulation.

[26] Our conclusion on the legitimacy of the enactment of the Regulation should dispose of this appeal. However, in deference to counsel for the parties who argued various issues such as discrimination, legitimate expectations and consultations, we go on to discuss them briefly.

[27] On the question of discrimination the respondents had argued before the trial judge that the decision by the PSC to lower the compulsory retirement age from 60 to 55 was incompatible with s.38(1) requiring equality before the law and subsections (2) and (3) which provide as follows:

> *(2) "a person must not be unfairly discriminated against directly or indirectly, on the ground of his or her:*
>
> *(a) actual or supposed personal characteristics or circumstances including race, ethnic origin, colour, place of origin, gender, sexual orientation, birth, primary language, economic status, age or disability;*
>
> *(b) opinion or beliefs, except to the extent that those opinions or beliefs involve harm to others or the diminution or the rights or freedoms of others.*
>
> *Or any other ground prohibited by this Constitution.*

[28] Subsection 7 is also of high relevance and it provides:

> ***A law is not inconsistent with subsection (1), (2) and (3) on the ground that it***
>
> ***(b) imposes a retirement age on a person who is the holder of a public office***
>
> ***but only to the extent that the law is reasonable and justifiable in a free and democratic society."***

[29] The appellants have argued that the compulsory reduction of the retirement age from 60 to 55 was within the exception provided for in subsection 7 in that it was reasonable and justifiable in a free and democratic society.

[30] On this question the trial judge held that the onus of proof was on the appellants and we agree with this view. He also held that "free and democratic society" in subsection 7 meant that the character of a free and democratic society was the relevant consideration and therefore subsection 7 did apply to Fiji even though the present government had not been elected. We are of the same view.

[31] His Lordship was taken to a number of Canadian decisions by the respondents and although he looked at a few of them, his general view was said at p.16 to be:

> ***"The Court has now had the opportunity to look at the Canadian Courts judgments referred to by the respondents. They have distinguishable characters. Most involved universities or hospitals. They are by and large autonomous and do not form part of "government" under their Charter or Rights and their employees would therefore not be holders of "public office" as defined under s.38(7) of our Constitution. The most important factor distinguishing the relevant Canadian cases is the existence already of a collective agreement between the institution and their employees. These agreements which included the compulsory retirement age, had been negotiated either personally or through respective organisations. The compulsory retirement age was not a condition imposed on their employees but they derived from negotiations and arrangements between the parties. It was the individual and staff***

members of these institutions that sought to challenge the provision of compulsory retirement age of 65. This is an important factor when considering whether a compulsory retirement age was reasonable."

[32] It will be obvious from this quotation that His Lordship regarded collective bargaining as an essential prerequisite to the amendment to retirement age. It is equally obvious, that he viewed, the reduction of the retirement age from 60 to 55 as a unilateral act by the PSC who merely informed the unions as to what it had done.

[33] Jitoko J referred at p.17 to Dickson CJC in the case of ***R v. Edward Book and Arts Ltd*** (1986) 35 DLR (4) 1 at 41 where Honour said:

"Two requirements must be satisfied that a limit is reasonable and demonstrably justified in a free and democratic society. First the legislative objective which the limitation is designed to promote must be of sufficient importance to warrant overriding a Constitutional right. It must bear on a "pressing and substantial concern". Secondly the means chosen to obtain those objectives must be proportional or appropriate to the ends. The proportionality requirement in turn, normally, designed, or rationally connected, to the objective, they must impair rights as little as possible; and their effects must not severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgement of right."

[34] Jitoko J went on to analyse what the "pressing and substantial" concern of the appellants was in this case. He has said on page 17:

"In this case the respondents "pressing and substantial concern" that they rely on to justify the curtailment of the employees rights under s.37 are the reduction of operation costs to compulsory redundancy of employees and the resultant increase in funds for the capital expenditure from the savings in salaries and wages of redundant employees through the impose lowering of retirement age to 55. In addition, the respondents say that the policy is intended to assist the unemployed especially the under graduates (sic) find the employment replacing those retiring. It was also the opportunity "to

restructure" the Public Service. The affidavits of the Secretary of the Public Service Commission, Ms Taina Tagicakibau, and Agni Deo Singh the General Secretary of the Fiji Teachers Union ("FTU") are filed by the respondents to support this policy consideration."

[35] It is clear that the trial judge used the phrase "pressing and substantial concern" which appears in the quotation from Dickson CJC laid out above as being synonymous with "reasonable and justifiable in a free and democratic society" in s.38(7).

[36] The ***Edward Book Case where*** Dickson CJC referred to a "pressing and substantial concern" involved the validity of a law which prohibited trading on a Sunday. The case dealt with the question whether such a law interfered with religious freedom. It was in that context that Dickson CJC used the phrase "pressing and substantial concern." The words in subsection (7) are: reasonable and justifiable in a free a democratic society". We believe that the trial judge fell into error when he used the phrase "pressing and substantial concern" synonymously with "reasonable and justifiable in a free and democratic society." Because the latter has nothing to do with any agency or substantiality but everything to do with legitimacy and propriety in a free and democratic society. They are different concepts. Accordingly we are of the view that Jitoko J erred in evaluating the appellants' evidence when assessing whether they had satisfied the exception in subsection (7).

[37] In her affidavit of 26 September 2007 Ms Tagicakibau outlined certain advantages that would be gained by the reduction of the retirement age from 60 to 55. She stated in paragraph 15 that the government would save $79,519,530.00 when the reduction in retirement age policy came into effect from 1st January 2009. She went on to say in paragraph 16 that if posts were filled selectively according to areas of need, government would save up to $10,455,610.00 when this policy is put into effect. In paragraph 18 she made the point that this policy would also enable the government to restructure the civil service and reduce operational costs.

[38] In his affidavit of 21 September 2007 Mr Agni Deo Singh, the General Secretary of the Fiji Teachers Union ("FTU") said in paragraph 7 that his union the FTU favoured the retirement age to be 55 and not 60 and then he gave reasons why the retirement age of 55 was preferable to that at 60.

[39] He said in paragraph 8 ***"By the age of 55 years, civil servants have worked for at least 30 years and are expected to have met all obligations in relation to their children in terms of education etc."*** Then in paragraph 9 he said that civil servants like all workers in Fiji were eligible for retirement benefits at the age of 55 years. They might take this in a lump sum and start a business on their own or receive it by way of fortnightly pensions.

[40] He then went on to make the important point that the retirement of civil servants at 55 would open the opportunities for young graduates to join the civil service. He said this in paragraph 10: ***There are over 2,000 graduates who are unemployed. 800 of these are qualified teachers. A large number of these 800 qualified teachers would have been trained by government at the Advance College of Education and Lautoka Teachers College or at the USP on a scholarship. A large number of these unemployed graduates are sons and daughters of poor people who would have taken loans for education for their children. Government employment becomes the last and sometimes only avenue for employment because of the limited opportunity for employment in the private sector.***

[41] I see the evidence of Agni Deo Singh to be very corroborative of the evidence of Ms Tagicakibau because Mr Singh is the head of the FTU and Ms Tagicakibau is the Permanent Secretary of PSC. It would be reasonable to expect that both of them would speak with authority and experience when they said in their affidavits that certain advantages relating to savings and job creation would flow from the reduction in the retirement age from 60 to 55.

[42] In our view, the trial judge did not give sufficient wait to the evidence of Ms Tagicakibau and Agni Deo Singh in relation to the advantages which would be

gained by the reduction in the retirement age from 60 to 55. In our view, although the advantages to be gained were bold assertions by Ms Tagicakibau we think that Jitoko J should have given more consideration and weight to this evidence, particularly, as there was no cross - examination and to an appreciable extent it was supported by the evidence of Mr Agni Deo Singh.

[43] Therefore I am of the view that His Lordship was wrong when he held at page 18 that the appellants had not demonstrated in a meaningful way facts or arguments sufficient to satisfy the court that any of the grounds advanced were of such substantial and pressing nature to satisfy the test for the application of exclusory provisions of under s.38(2).

[44] In relation to the evidence of Agni Deo Singh His Lordship had this to say on pages 19 and 20:

> ***"Both the respondents and Agni Deo Singh on behalf of FTU lay great emphasis on employment of undergraduates and the need to implement the new 55 compulsory retirement age as a way of reducing the unemployment. Mr Singh estimates the number of undergraduates as over 2,000 with 800 qualified teachers amongst them. In Mr Singh's submission, many of the government employees that will be affected would have served for at least 30 years and at 55 they are eligible for their FNPF contributions which he suggested that "they may take this as a lump sum and start a business of their own or receive it by way of fortnightly pensions". This argument I must say lacks any merits whatsoever. First as the Applicant's make clear not all employees would have served at least 30 years in the service. Not all employees have accumulated enough FNPF funds at 55 to retire or start their own business or come under a suitable pensionable scheme. In any case the fact that not everyone will be in the same position, is discriminatory of itself."***

[45] I disagree. The rejection of PSC's argument by the trial judge was without foundation because he had no evidence upon which he could decide the extent to which the public servants would have served 30 years and secondly, there was no evidence to determine the extent to which the public servants would have accumulated enough FNPF funds at 55 to retire and start their own business. In

contra-distinction to this the trial judge had the evidence of Ms Tagicakibau and Agni Deo Singh to the effect that the reduction in the retirement age would bring about benefits to the public servants as outlined by them in their affidavits. They were not cross-examined on their affidavits and in our view their evidence should have been accepted by the trial judge. Had he done so, it would not have been possible for him to conclude as he did.

[46] After dismissing other arguments of the appellants relating to productivity and restructuring he went on to hold as follows at page 22:

> ***"It is evident from the court's view expressed above that the objective of the policy decision resulting in the Public Service (General) Retirement age – (Amendment) 2007 do not meet the threshold requirement of what is reasonable and justifiable in a democratic society. "The policy may be said to further a substantial objective of creating an employment for their unemployed and at the same time reducing some costs to government, but, it is, in the view of this Court, neither proportionate nor rationally connected to the objectives to be accomplished. In the result, this court finds that the application of the exception to equality as to age provided for s.38(7)(b) of the Constitution and argued by the respondents cannot be sustained. The decision is not one that can be said is reasonable and justifiable in a democratic society. That being so, it follows that the decision is in breach of s.38 of the Constitution."***

[47] His Lordship's error in applying the wrong test in evaluating he applicability of the subsection (7) exception was compounded by his lack of proper analysis of the evidence of Ms Tagicakibau and Agni Deo Singh. I reject His Lordship's conclusion that the appellant had failed to satisfy the test in the exception under subsection (7). I hold that the PSC's act in making the Regulation was "reasonable and justifiable in a democratic society" in the light of the evidence of Ms Tagicakibau and Mr Singh.

[48] The qualification created by s.38(7) is for such significance that it deserves more elaboration. It is not peculiar to the constitutional arrangements of the Republic of the Fiji Islands. Section 45(1) of the ***Constitution of the Federal Republic of Nigeria 1999,*** s.38(1) of the ***Constitution of the Independent State of Papua New Guinea*** and ss.8 to 15 of the ***Constitution of the Solomon Islands*** each permit eh

abridgment of certain constitutional rights and freedoms by reference to what may be 'reasonably justifiable in a democratic society': see Chalmers D, 'Human Rights and What is Reasonably Justifiable in a Democratic Society' (1975) 3(1) ***Melanesian Law Journal 92***. Section 1 of the ***Canadian Charter of Rights and Freedoms*** similarly subjects the guarantees contained in that document 'to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.' Lastly, Art 19 of the Constitution of India makes allowance for 'reasonable restrictions' on certain constitutional freedoms.

[49] Aside from a number of Canadian decisions from which this court has drawn only limited assistance, neither counsel appearing for the appellants nor for the respondents referred to any authority touching on the manner in which this court should interpret the words contained in s.38(7). I believe that the issue is one which calls for our further comment, although not necessary to be decided because of the conclusion I have reached on the question of the PSC's discretionary power under s.173(1) of the Constitution. I make reference to a number of authorities my independent researches have found.

The Concept of Reasonableness Under s.38(7)

[50] In ***The State of Madras v V.G. Row AIR*** 1952 SC 196, the Supreme Court of India considered the concept of 'reasonableness' in the context of Art 19 of the Constitution of India. In that case, Sastri CJ said at p.200:

> ***"It is important in this context to bear in mind the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned and no abstract standard, or general pattern, or reasonableness, can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict. In evaluating such elusive factors and***

forming their own conception of what is reasonable in all circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the judges participating in he decisions should play an important part, and the limit to their interference to the legislative judgment in such cases can only be dictated by their sense of responsibility and self restraint and the

sobering reflection that the Constitution is meant not only for people of their way of thinking but for all, and that the majority of the elected representatives of the people have in authorizing the imposition of the restrictions considered them to be reasonable."

[51] These observations were adopted by Kapi J in ***Supreme Court Reference No. 2 of 1982*** [1982] ***PNGLR 214*** which were reference proceedings to the Papua New Guinea Supreme Court of Justice to determine the validity of the ***Organic law on national Elections (Amendment) Act 1981.*** After noting at p.235, the ***extremely difficult*** task of ***giv[ing] any proper interpretation*** to the phrase ***reasonably justifiable in a democratic society.*** His Honour stated at 236 that the concept of reasonableness advanced by Sastri CJ in The State of Madras was one which applied to 'the interpretation of what is reasonably justifiable in any given case.'

[52] After citing ***Supreme Court Reference No. 2 of 1982*** and ***The State of Madras,*** Connolly JA, with whom Sir John White P and Kapi JA agreed, in ***Tri-Ed Association v S.I. College of Higher Education*** *[1985-1986] SILR 173* at 187 adopted the observations of Sastri CJ as 'stating considerations which are relevant for the purposes of the Constitution of the Solomon Islands.'

[53] In ***Feratalia v Attorney-General*** [2002] SBHC 73, after citing ***The State of Madras*** with approval, Muria CJ added the following:

"The test is one of reasonableness, which cannot simply be viewed as an abstract standard since fundamental rights exist in a real world with real people and with practical life-situations. In other words the principles of democracy based on freedom and equality must be applied to particular circumstances on a case by case basis... What must clearly be borne in mind is that in this balancing process, it is

important to ensure firstly, the restriction is sanctioned by law; secondly, the purpose for which the right is to be limited and the importance of the purpose to the community concerned exist; thirdly, there is a compelling social need for the restriction; and fourthly, it is reasonably justifiable in a democratic society. The Courts in this country and in the prevailing conditions at this time play an important role as an instrument, not only of justice but also of peace and stability, in our democratic society. In this role therefore, the Courts must ensure that fundamental rights as guaranteed by the Constitution are guarded and if they were to be restricted, it must be done under the authority of the law and with measures reasonably justifiable in the given situation."

[54] The Privy Council decision in ***de Freitas v. Permanent Secretary of Agriculture, Fisheries, Lands and Housing and Others*** [1999] 1 AC 69 involved a consideration of proportionality in the evaluation of ***reasonableness*** in the phrase ***reasonably justifiable in a democratic society*** in s.12(4) of the Constitution of Antigua and Barbuda. The circumstances were that the Permanent Secretary had interdicted de Freitas from exercising the powers and functions of his office pending disciplinary proceedings against him claiming that he had acted in breach of s.10(2)(a) of the ***Public Service Act*** which prohibited the dissemination of information or expressions of opinion on matters of national or international political controversy. Section 12(4)(a) disallowed laws which interfered with public expressions of public servants unless the law was shown to be reasonably justifiable in a democratic society.

[55] The Privy Council allowed the appeal and unanimously held that the restraint imposed on civil servants by s.19(2)(a) was not reasonably justifiable in a democratic society and therefore contravened s.12(4) of the Constitution. It followed that the interdiction of the appellant contravened his constitutional right.

[56] Their Lordships accepted and adopted at page 80 the test of reasonableness propounded by Gubbay CJ in ***Nyambirai v National Social Security Authority*** [1996] L.R.C. 64 at 75 where the Chief Justice saw the quality of reasonableness in the expression reasonably justifiable in a democratic society:

> ***"as depending upon the question whether the provision which is under challenge "arbitrarily or excessively invades the enjoyment of the guaranteed right according to the standards of society that has a proper respect for the rights and freedoms of the individual. In determining whether a limitation is arbitrary or excessive he said that the court would ask itself: "whether (i) the legislative objective is sufficiently important to justify limiting a fundamental right: (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."***

[57] In the absence of any Fijian authority which has fully analysed s.38(7), we are persuaded to accept the analyses of the Privy Council, the Papua New Guinea Supreme Court of Justice and the courts of the Solomon Islands on the proper construction of s.38(7). Like those courts, we too adopt the observations of Sastri CJ in ***The State of Madras*** and of the Privy Council in ***de Freitas*** as relevant to the considerations relating to what is reasonable in the interpretation of s.38(7). Though we recognise that the precise formula of words contained in s.38(7) differs from the words considered in the cases to which we have made reference, the concepts are essentially the same across the jurisdictions: see ***Leung Kwok Hung & Others v HKSAR*** [2005] 3 HKLRD 164 at 183 (34).

The Concept of a Free and Democratic Society under s.38(7)

[58] My researches have only discovered one authority that has considered in any detail what the words ***free and democratic society*** mean. In ***Patel v The Attorney-General*** [1968] ZR 99 a decision of the High Court of Zambia, Magnus J said at 129:

> ***"I think it is necessary to adopt the objective test of what is reasonably justifiable, not in a particular democratic society, but in any democratic society. I accept the argument that some distinction should be made between a developed society and one which is still developing."***

[59] I have already said that I agree with Jitoko J that Fiji was a free and democratic society in effect despite the government being in power without elections.

[60] Whether the law of Fiji ought to adopt criteria identical or similar to that developed by the Canadian Supreme Court for the purposes of determining whether a law is 'reasonable and justifiable in free and democratic society' for the purposes s.38(7) of the Constitution is a question this court ought not answer in the absence of full argument from the parties. Considerable caution must be exercised in drawing on constitutional principles outside of Fiji. As Viscount Radcliffe warned in ***Adegbenro v Akintola*** [1963] AC 614 at 632:

> ***"[I]t is in the end the wording of the Constitution itself that is to be interpreted and applied, and this wording can never be overridden by the extraneous principles of other Constitutions which are not explicitly incorporated in the formulae that have been chosen as the frame of this Constitution.***

[61] As for legitimate expectations, I agree with the trial judge when he said on page 24 that the essential elements which he discerned from the authorities were that legitimate expectations might arise by giving of assurances and/or the existence of regular practice that was expected to be followed.

[62] In paragraph 6 of her affidavit, Ms Tagicakibau gives the following uncontroverted evidence:

> ***"That the compulsory retirement age was pegged at 60 years up until after the 1987 political crisis when it was changed to 55 years. This was changed to 60 years again on 1 June 2000. This change in policy was done by virtue of Legal Notice 55/2001."***

[63] In addition to the two previous changes in the retirement age, I also note that the conditions upon which a public servant is engaged as an employee of the government very clearly state that government is entitled to change the conditions

of work at its own discretion: see p.2 of the trial judge's judgment where he sets out these matters.

[64] The third point about retirement age and conditions of employment which I make is that there was no evidence before the trial judge of any assurance made by the PSC that the retirement age would not be changed.

[65] Accordingly, I fail to see how any legitimate expectation arose in the respondents to the effect that the retirement age would not be changed especially, in the light of the previous changes to it, the conditions of employment and the absence of any representations that it would not be changed.

[66] Accordingly, I am of the view that the trial judge was in error when he held that there was a breach of the respondent's legitimate expectations by a failure of proper consultations for two reasons.

[67] First, if you accept, as I do that the PSC had the discretionary power under s.173(1) of the Constitution that by regulation it could make provision for regulating and facilitating the performance of its functions then no question of any expectations can arise and secondly, the PSC was required to give the respondents a fair hearing, in our view it did.

[68] I think that the result in ***Bates v Lord Hailsham of St Marylebone and Others*** [1972] 3 All ER 1019 where Megarry J held that a committee whose function under statute was of legislative and not an administrative, executive or quasi/judicial nature, was not bound by rules of natural justice or by any general duty of fairness to consult all bodies that would be affected by the order it made under the powers delegated to it by statute is highly apposite here.

[69] Accordingly, I agree with the counsel for the appellants that the decision of PSC was an exercise of legislative power and as such there was no duty to consult.

[70] I have said enough to form the basis for rejection of the respondent's argument that the PSC was obliged to consult with the respondents because of the existence of a legitimate expectation.

[71] I should like to make clear that the PSC's failure to refer the matter as a trade dispute is included in our consideration of legitimate expectation and failure to consult.

[72] As before, in deference to counsel for the respondents I proceed to discuss below the question whether it could be said that the PSC had failed to properly consult with the respondents.

[73] It is clear that consultation is a part of a fair hearing in circumstances where legitimate expectations have been aroused in those who are seeking judicial review: See ***Re Westminster County Council*** [1986] AC 688.

[74] The trial judge's meaning of consultation was expressed as follows:

> ***"Consultation is a process that by definition means talking and discussing together, while seeking advise and counsel. It invokes the idea of coming together, discussing, listening taking counsel and reaching consensus. But the term means much more and I will suggest takes on a technical meaning. When used to define meetings of parties such as employer/employee, in the field of industrial relations and under the auspices of collective agreements. Consultation in this context, given that one is dealing with terms and conditions of service, by implication means consultation and agreement."***

[75] I disagree. "Consultation" is not a term of art as His Lordship thought. It is nothing more that the meeting of parties to exchange information, views and ideas. It definitely does not involve the reaching of an agreement. The trial judge used the

word consultation as being synonymous with negotiation culminating in an agreement and it is not.

[76] No authority was cited by the trial judge in coming to the view which he did on the meaning of "consultation" nor did he refer to any legal or other dictionary which defined the word. In ***Stroud's Judicial Dictionary of Words and Phrases*** – 7th edition by Daniel Greenberg "***CONSULTATION***" is defined in the context of local authorities in the following terms:

> ***"Consultation means that, on one side, the Minister must supply sufficient information to the local authority to enable them to tender advise and on the other hand, a sufficient opportunity must be given to the local authority to tender advise."***

No mention is made in the definition about agreement being reached between the parties."

[77] His Lordship analysed the evidence presented by the appellant regarding consultations and concluded that there had not been proper discharge of their duty in respect of consultation.

[78] I also have analysed the minutes of meetings which were annexed to the affidavit of Ms Tagicakibau and we are of the view that there were ample consultations offered by the PSC and availed of by the respondents and whilst no agreement was reached between the parties, there appears to have been plenty of discussion of the issues that confronted them.

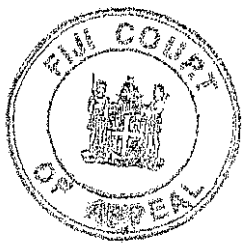
[79] In the light of these matters, we are of the view that even if the PSC were under a duty to consult with the respondents, it discharged their duty by meeting with respondents on a number of occasions to discuss the issues between them. There was no obligation on the PSC to arrive at any agreement with the respondents.

[80] I make the following orders:

(a) The appeal is allowed.

(b) The declaration of Jitoko J that the PSC's decision of 9th March, 2007 was null and void is quashed.

(c) The respondents shall pay the appellants' costs assessed at $3,500.00.



Khan, JA

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