

IN THE HIGH COURT OF FIJI

At Suva

Civil Jurisdiction

JUDICIAL REVIEW NO. 0024 OF 2005



IN THE MATTER of an application by **MOHAMMED FERUZ** seeking leave to apply for Judicial Review RHC Order 53 Rule 3(2), as the Applicant

AND

IN THE MATTER of the decision by the **PUBLIC SERVICE APPEAL BOARD**, dated 29th April 2005 allowing the appeal by Mrs. Seruwaia Savutini against the provisional appointment of the applicant by the Ministry of Education, as the Respondent

Between : **Public Service Appeal Board**

First Respondent

And : **Ministry of Education**

Second Respondent

Mrs. Seruwaia Savutini

Interested Party

Ex-parte : **Mohammed Feroz**

Applicant

Counsel : **Mr. M.A. Khan for the Applicant
Mr. E. Veretawatini for the First Respondent
Mr. A. Pratap for the Second Respondent
Mr. J. Raikadroka for the Interested Party**

Date of Hearing : **22nd August, 23 September and
13th October 2005**

Date of Judgment : **18th November 2005**

JUDGMENT

On 15th April 2004 a vacancy for the Head of Department in Physical Education, Music, Arts and Crafts (PEMAC) at Swami Vivekananda College in Nadi was advertised in the Fiji Service Official Circular. The applicant Mohammed Feroz and a number of others applied for the position. Mohammed Feroz was successful. The interested party Seruwaia Savutini was one of the applicants. She was not successful.

By letter dated 12th January 2005 Mrs. Savutini appealed against the provisional appointment of Mohammed Feroz to the Public Service Appeal Board.

The Public Service Appeal Board (PSAB) heard the matter on the 26th of April 2005 and gave its decision on 29th of April. They found that the applicant and interested party both met several of the qualifications. They found that the interested party had met two specific qualifications whereas the applicant herein had failed to meet them. In those circumstances they allowed the appeal and gave the reasons as the facts that the interested party "has an edge over the provisional appointee (the applicant) in terms of having 5 years of competent teaching experience with at least 2 years in senior forms in relevant subject areas and potential to advance to higher posts".

I have before me the affidavit of Mohammed Feroz dated 25th of May and 27th of June, the affidavit of Josese Bisa dated 1st June, the affidavit of Suliasi Lutubula dated 26th of August 2005 the original application for leave to apply for Judicial Review and the Notice of Motion for Judicial Review, together with the submissions and representations of the parties.

This matter is being decided upon the face of the affidavits sworn by the various deponents together with the cross-examination of Suliasi Lutubula by counsel for the 1st respondent, the Public Service Appeal Board and the interested party.

The Notice of Motion for Judicial Review seeks the following reliefs :

- " 1. For an order for certiorari to remove the said decision of the Public Service Appeal Board allowing on the 29th day of April 2005 an appeal by the interested party against the provisional promotion of the applicant by the Ministry of Education into this Honourable Court and be quashed.
2. For declaration that the first respondent erred in law in failing to take into account that the interested party did not have the required qualification and five years of secondary school teaching experience to be eligible to apply for the said vacant post of HOD(1) PEMAC at Swami Vivekananda College on Vacancy No. 334/04.
3. For declaration that the first respondent's reason in dismissing (sic, presumably "in allowing") the appeal cannot be upheld, is in contravention of section 140 of the 1997 Constitution, breach of section 4 of the Public Service Act, 1999, in denial of natural justice, improper, unfair, unreasonable, and in breach of the legitimate expectations of the applicant depriving him promotion, and ultra vires and null and void.

4. For an order for mandamus directing the respondent to rehear the appeal de novo on merit.
5. For an order for costs on solicitor and client or indemnity basis.

"The grounds of this application are set out in the affidavit of Mohammed Feroz filed on the 25th day of May 2005."

Those grounds are set out at page 5 and are as follows :

"21. I contend that the first respondent's reason for its decision (Annexure MF1) :

"That the appellant has an edge over the provisional promotee in terms of having 5 years of competent teaching experience with at least 2 years at senior forms in relevant subject areas and potential to advance to higher post," is in contravention of section 140 of the 1997 Constitution, breach of section 4 of the Public Service Act, 1999, in denial of natural justice, improper, unfair, unreasonable and outrageous and in breach of my legitimate expectation depriving me promotion, and ultra vires and null and void.

22. I further contend that contrary to section 26(9) of the Public Service Act 1999 the Public Service Appeal Board had failed to accord natural justice to me at the hearing or give full reason for its decision particularly in view of the fact that the interested party neither had completed full PEMAC course nor she had the required five year competent secondary teaching experience.

23. I also contend and humbly submit that the Appeal Board had failed to take into account that it had previously disallowed appeals by those who did not have five years competent secondary teaching experience.

24. That it had failed to take into account that onus to prove an appeal was on the interested party, which she has failed to discharge."

It is apparent that there has been a lack of clarity in two regards which has given rise to the findings of the PSAB and the bringing of this application for Judicial Review. The starting point in resolving this matter is the original advertisement itself.

The advertisement reads as :

"334/2004 Head of Department [1] PEMAC [ED5C]

Swami Vivekananda College

Responsible to the Principal for the PEMAC Department of the School.

The appointee would be required to manage departmental organization and provide professional leadership and guidance to the departmental staff on curriculum issues and related matters in order that teachers maximize their knowledge and develop their repertoire of teaching skills so that students excel in their studies.

Qualifications :

Recognised university degree with relevant subject majors for all HOD positions except PEMAC. Teacher training is essential. For PEMAC the successful completion of conversion course plus diploma PEMAC (MOE). Graduates of PEMAC will have an advantage. Additionally, at least 5 years competent teaching experience with at least 2 years at senior forms in relevant subject areas. Completed 3 years of rural service ; or superior assessment in the last 3 years. Potential to advance to higher post.

Salary :

ED5C \$20,674-\$24,478."

There are two central misunderstandings in this case. The Ministry of Education regarded the words "at least 5 years competent teaching experience" as meaning five years experience at secondary level. This was the basis on which the Ministry of Education's selection was made.

The second misunderstanding is this. Mohammed Feroz gained a Diploma in Teaching from the Islamic Institute of the South Pacific in April 1997. The Ministry of Education regards this as an acceptable qualification for its requirements and considered 'grant-in-aid' teachers and their time spent teaching as qualifying for their purposes.

When the matter was before the PSAB the 5 years competency requirement in the advertisement was seen as teaching experience at primary and or secondary level and not specifically at secondary level. Mrs. Savutini, qualified with her overall years of teaching experience but fell short, according to the Ministry, in respect of years at secondary level. The PSAB was not appraised of or did not comprehend the way in which the Ministry of Education regarded Mr. Feroz's qualifications and experience and therefore regarded him as falling well short of the requisite five years at either level, considering his term ran from his tertiary qualification in 2003.

Specific reference to Mohammed Feroz's 1997 Diploma was not present on the face of the documents referred to the PSAB. Reference was made to his Grant-in-Aid teaching experience (Appendix B, page 18, to the affidavit of Josese Bisa). That experience was discounted by the Board. On the other hand the first interested party's qualifications show a Teachers Registration Certificate in 1979 and a Diploma in Education in 1999. On the Board's assessment those qualifications did count and gave her more than five years teaching experience, though not at secondary level. There is an ambivalence in the Board's reasons for their findings on this subject which is addressed later.

It is pertinent to note specifically for this post that Mohammed Feroz had a Diploma covering all the PEMAC subjects (a two year course) whereas Mrs. Savutini only had a diploma covering physical education/music, (a one year course). The original application stated "Graduates of PEMAC will have an advantage".

Mr. Feroz's "date appointed to service" is inserted in the merit analysis of the Ministry as 26/01/04 whilst that of Mrs. Savutini is recorded as 21/01/80. Clearly on that rendering of the information Mr. Feroz did not have anything like five years experience, when in fact according to the Ministry of Education criteria he did.

The Ministry did point out in its response to the grounds of appeal that Mrs. Savutini did not have the 5 years teaching experience "as a secondary school teacher". They further pointed out that as far as PEMAC was concerned art and craft had not been included in her one year PEMAC Diploma. This compared with Mr. Feroz who had completed the two year diploma and had included those subjects. Mrs. Savutini in her response to the applicant's arguments to the PSAB stated that the advertisement did not stipulate "5 years competent teaching experience for secondary level" but just "5 years competent teaching experience".

The Ministry's representative clarified that the appellant had challenged the length of the applicant's teaching experience and responded at paragraph 6(b)(i)-(vi) (page 2, Annexure B, affidavit of Josese Bisa) with their reasons why they considered he did meet the length of teaching requirement. They further pointed out that the five year competent teaching experience meant competent teaching experience at secondary level of which at least 2 years had to be in senior forms.

The PSAB took time to deliberate and found that the appellant "has an edge over the provisional appointee in terms of having five years of competent

teaching experience with at least two years at senior forms in relevant subject areas and potential to advance to higher posts".

The applicant states that in coming to their conclusion the Board has overlooked the fact that at the time of the advertisement Mrs. Savutini was still some nine months off the five year qualification at secondary level. Further he has the two year PEMAC Diploma covering all subjects whereas the appellant only has a one year Diploma covering two of the four subjects.

After the appeal decision the Ministry brought the five year requirement to the attention of the PSAB in a letter dated 11th of May 2005 (Annexure MF.14 to the first affidavit of Mohammed Feroz). In another case cited in that letter the PSAB had apparently accepted that an appellant and provisional promotee for an HOD post had met the minimum qualification requirements when neither had five years secondary teaching experience. The Ministry sought to correct this and queried how Mrs. Savutini could meet the Minimum Qualifying Requirements (MQR) when she was nearly ten months short of the qualifying period. This position, concerning the other case, was acknowledged by the PSAB in their letter of the 12th of May 2005 when the PSAB used the words "5 years competent teaching experience ...". Their use of that phrase referred to teaching experience at secondary level. No response was given concerning Mrs. Savutini.

Many people would read the word competent in the original advertisement as meaning competent in their work, whether it be at primary or secondary level. In the Ministry's assessment to be competent for the post, a secondary one, meant experience at secondary level. They say teaching at primary and secondary level are not the same. It is one of their set Minimum Qualifying Requirements for posts at secondary level that there is experience at secondary level.

The reality is that as far as teachers applying for this post are concerned they would not know precisely what is meant by competent. However, when it came to the Ministry making their selection in this case this was done on the basis of five years experience at secondary level. Mrs. Savutini did not qualify at that time. Mr. Feroz did. However, when the appeal was decided by the PSAB the "secondary level" requirement had disappeared. The Ministry's position about how they regarded Mr. Feroz's length of teaching experience was either not known or not accepted by the PSAB and the fact of his 1997 teaching qualification was lost.

It is for the Ministry of Education to decide and apply what qualifications they will accept and what requirements they make for any education post. The PSAB, when entertaining an appeal cannot apply different requirements. It must be said they were left with the dilemma upon how to interpret the word competent and chose, in one part of their minutes, a reasonable meaning, though one that was at odds with that applied by the Ministry.

The evidence of Suliasi Lutubula gave factual support to the Ministry's stance. He was cross-examined vigorously, but fairly and was unshaken. I accept his evidence. The affidavits of the other witnesses were unchallenged. There is no argument with paragraph 9 of the affidavit of Josese Bisa where he states the Board is fully guided by the MQR. The problem in this case was defining precisely what the MQR were and which qualifications and experience were being recognized and which not.

There is a further lack of clarity in one important particular. According to the face of the documents before the Court, when the Ministry considered her case, Mrs. Savutini's secondary teaching experience began with her regrading to secondary level on 24th January 2000. That meant she fell short of the five year qualification on the date of advertisement.

In her appeal letter (Appendix A to Appendix B page 14 of the affidavit of Josese Bisa) she stated "Additionally I have completed 20 years teaching experience inclusion of 5 years in secondary schools teaching Forms 3-7".

The Board in its Minutes of Appeal (Appendix B, above, p.4) reiterated this and continued "her submission was neither disputed nor questioned. She therefore met this qualification requirement", namely five years experience at secondary level.

This was not so. The Ministry had made it clear they did not consider she had met the five year secondary qualification (See Appendix B, to Appendix B P-19).

What appears to have happened on the face of the documents is that Mrs. Savutini had either highlighted or introduced this experience after the Ministry's decision and when she made her appeal.

It is inconsistent of the Board at page 2 of the Minutes of Appeal, paragraph 6(1) to state "The Board noted from the Ministry's submission that the appellant did not qualify as she did not meet the 5 years competent teaching experience in secondary school. However, the Board further noted that the MQR did not state this but only mentioned "5 years competent teaching experience with at least 2 years in senior forms in relevant subject areas", "five (5) years teaching experience as a secondary teacher" is the Ministry's own making,"

yet at paragraph 8.3(c) to say :

"... she has in her written submission stated that she has taught for 5 years in secondary school teaching forms 3 to form 7. Her submission was neither disputed or questioned. She therefore met this qualification requirement."

If the Board is saying she met the five year qualification by dint of actual secondary teaching (forms 3 to 7), this clearly ran counter to the merit analysis supplied by the Ministry and was an assertion of fact that apparently appeared only on appeal.

I have no evidence as to whether this failure by her was an oversight or deliberate to gain an advantage on appeal or done on the basis she regarded all her teaching experience as qualifying without the need to highlight the secondary years.

in these circumstances, it cannot be said that the decisions of the PSAB were founded on the same qualifying criteria and experience as those of the Ministry. Therefore, the decision of the PSAB cannot stand. Accordingly I consider that a Writ of Certiorari should issue to bring the decision of the Public Service Appeal Board of the 29th April 2005 into this court and that it be quashed.

The Appeal Board also gave as a reason for allowing the appeal that the appellant, Mr. Savutini had an edge in "potential to advance to higher posts". Her qualifications and current personal initiatives were listed and her performance, while acting as Head of Department, was graded as "Good" and "Fitted for Promotion".

Mr. Feroz's qualifications and initiatives were set out in narrative form and it was then stated "He is still a temporary teacher and is yet to prove that he has the potential to advance to a higher post. He has therefore failed to meet this qualification requirement." This assessment fails to acknowledge Mr. Feroz's length of experience, according to Ministry criteria, and specifically his assessments for the years immediately preceding, namely 2001- Good/Fitted for Promotion, 2002 and 2003 - In- Service Training, 2004 - Good/Highly fitted for promotion. These promotion assessments were before the Board.

Given the fact that this is one of the reasons for allowing the appeal and that the Board did not take into account all the points in Mr. Feroz's favour before making its decision this failure must also support the issue of a Writ of Certiorari.

It follows, therefore, that I must make the declarations sought at paragraph 3 of the Notice of Motion, though I find the contravention was the breach of the legitimate expectation of the applicant, in that he could expect the same criteria to be used and qualifications to count for the Board's decision as had for the Ministry's. I make no declaration in the terms requested at paragraph 3.

What, if any, further orders should be made? Whatever course is taken feelings of unfairness will be engendered in one or more people.

I do not consider a fresh advertisement should be issued and the whole process started again. The original ambiguity meant that more people would feel qualified to apply than in fact could do so. To this extent there is no unfairness to anyone who might say, "if I'd known what "competent" meant, I would have applied".

The Ministry's selection was done on the basis of the 5 year secondary level criterion. To that extent all applying candidates were treated the same. It is pertinent to highlight that another applicant, Anand Kumar, was eliminated as not having 5 years at secondary level although, like Mrs. Savutini, he did have more than 5 years teaching experience. On the face of the criteria supplied neither Anand Kumar nor the fourth applicant can realistically say they should be reconsidered. Neither has appealed.

There is also an ever-increasing importance that this matter be resolved sooner rather than later, for the benefit of the parties to this case, particularly Mrs. Savutini and Mr. Feroz, and the students and College itself.

There is another factor to resolve. By dint of passage of time Mrs. Savutini now on any basis meets the 5 year secondary qualification. She may not have done at the time of advertisement of the vacancy. I find I must take that date as the qualifying time. To do otherwise would invite problems and unfairness. First, anyone who didn't apply at the time because they were a few months short would feel aggrieved. Second, such a decision would lend itself to those who were a few months short making application and then when unsuccessful indulging in appeals to gain the remaining qualifying time.

The reality is the Ministry regarded it as a Minimum Qualifying Requirement that candidates have five years of secondary experience. That is how all the applications were treated. That, in the opinion of the Ministry, is what the post requires. PEMAC graduates were to be given an advantage for a post entitled "Head of Department [1] PEMAC".

On the Ministry's criteria Mohammed Feroz met all the minimum qualifications for the post and was placed with an "advantage" in that he held the PEMAC qualification in all subjects. He should not have been eliminated from contention on the grounds of failure to meet minimum qualifications.

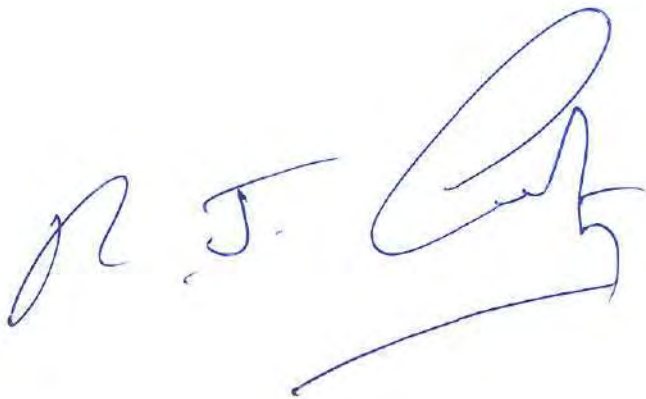
Accordingly I will issue a Writ of Mandamus directing the Public Service Appeal Board to rehear the appeal de novo and on this basis :

The minimum qualifying requirements are to be as stipulated by the Ministry - particularly in respect of :

- (a) the need for five years teaching experience at secondary level and stating precisely what that means and whether that five years refers to experience at secondary level or five years at secondary level since secondary qualification, and

- (b) the Ministry's recognition of Mr. Feroz's qualifications and experience and his promotion assessments, and
- (c) the provision by Mrs. Savutini of the details of her teaching experience which she says meet the Ministry's minimum qualification requirements, particularly concerning the five year secondary teaching requirement.

1 will hear the parties on costs.

A handwritten signature in blue ink, appearing to read 'R.J. Coventry', with a long horizontal line underneath.

(R.J. Coventry)

JUDGE