IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

JUDICIAL REVIEW ACTION NO.: HBJ 23 OF 2006

BETWEEN:

THE STATE v. THE PUBLIC SERVICE APPEALS BOARD

RESPONDENT

BRIAN SINGH

INTERESTED PARTY

EX-PARTE: PUBLIC SERVICE COMMISSION

APPLICANT

Dr J. Cameron for Applicant

Mr. E. Veretawatini for Respondent

Mr. D. Sharma for Interested Party

Date of Hearing: 5th October 2006

Date of Judgment: 29th November 2006

JUDGMENT

The Public Service Commission has the function to appoint, discipline and remove holders of public office – Section 147(1) of the Constitution. Brian Singh who is the Interested Party was a holder of public office being the Chief Executive Officer (CEO) Labour, Industrial Relations and Productivity since December 2003.

In July 2004, 19 disciplinary charges were laid against him by the PSC. These charges arose out of his official travel overseas on a number of visits allegedly booked on business class but travel was by economy, the difference in fares not being refunded to the State. The hearing took place on 30th November 2004 and he was found guilty. As a result of the disciplinary proceedings the applicant's contract was terminated by the PSC.

The applicant appealed to the Public Service Appeals Board (PSAB) which reversed the decision on the ground that the disciplinary proceedings had not been instituted against the applicant in accordance with Clause 12.6 of the contract of employment. Clause 12.6 of the applicant's contract of employment required the PSC to appoint a person or group of persons to investigate the allegations before charges were laid. This the PSAB found had not been done.

I note that the respondent besides filing a copy of record has gone on to file an affidavit in reply and also submissions. This is going beyond the usual practice which is for the Tribunal to only file copy of the record of proceedings. From then on it remains neutral and takes no part in trying to support its decisions. I am not taking its affidavit or its submissions into consideration but only the copy record of its proceedings.

The grounds on which the applicant brings this judicial review application are :

> *"(a) The decision was made without jurisdiction, the Board having found contrary to fact that the Applicant had breached its contract with the Interested Party by failing to appoint a person or group of persons to investigate the allegations against the Interested Party when the Respondent had in fact appointed the Chief Executive Officer to investigate the matter, and the Chief Executive Officer had conducted an investigation, and*

reported back to the Commission with a recommendation before charges were laid against the Interested Party.

(b) The Board had regard to an irrelevant consideration and failed to have regard to a relevant consideration in relation to the appointment referred to above."

WAS THIS APPLICATION FOR JUDICIAL REVIEW FILED OUT OF TIME

3 Month Rule – Order 53 Rule 4

One of the remedies sought is a certiorari to quash the PSAB's decision dated 23rd March 2006. This application was filed on 29th June 2006, over three months from the date of decision. Hence the provisions of Order 53 Rule 4 became immediately relevant to these proceedings. Mr. Sharma submitted that in view of this Rule, the court should not even grant leave as the application is out of time. Order 53 Rule 4(1) and (2) reads :

"4.– (1) Subject to the provisions of this rule, where in any case the Court considers that there has been undue delay in making an application for judicial review or, in a case to which paragraph (2) applies, the application for leave under rule 3 is made after the relevant period has expired, the Court may refuse to grant –

(a) leave for the making of the application, or

(b) any relief sought on the application,

if, in the opinion of the court, the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.

(2) In the case of an application for an order of certiorari to remove any judgment, order, conviction or other proceedings for the purpose of quashing it, the relevant period for the purpose of paragraph (1) is three months after the date of the proceeding.

(3) Paragraph (1) is without prejudice to any statutory provision which has the effect of limiting the time within which an application for judicial review may be made."

There was no application by the applicant to file the application out of time. However, the applicant submitted that there was no need for a formal application for extension of time. There was no element of surprise or any one prejudiced by a delay of six days. It made the application orally to extend time if such was warranted.

Applications for extension of time in case of judicial review should be made as part of the application for leave and it ought to ask the court to exercise its discretion despite the delay. Reasons for delay must be given – Mobil Oil Australia Pty Limited v. Ministry of Labour and Another – HBC 55 of 2006.

The decision of the PSAB is dated 23rd March 2006. Hence under Rule 4 the time for making the application for certiorari would expire on 23rd March 2006. Looking at the record of proceedings, one can say that on the date of hearing that is 21st March 2006 parties and/or their legal representation were present. The record does not disclose whether or not notice of delivery of decision was given to the parties. However I note from annexure B of the affidavit of Brian Singh dated 18th July 2006 that the PSAB had informed the interested party of its decision by letter dated 23rd March 2006. It was received by his solicitors on 28th March 2006. The solicitor then faxed that letter to the applicant referring to the decision and asking the interested party's reinstatement. It was faxed to the applicant on 28th March 2006 at 5.25 p.m. and another letter sent on 30th March 2006 seeking

resolution of the matter in view of the decision on appeal – annexure C, of same affidavit.

Need for promptness in Judicial Review

Judicial review provides an expeditious procedure to deal with public law matters. The purpose would be frustrated if a leisurely approach were taken in such matters – The State v. Public Service Commission, Ex-parte: Sevuloni Nasalasala – HBJ 36 of 1987. Lord Diplock in O'Reilly v. Mackman – 1983 AC 237 at 280H emphasized the need for promptness and speedy certainty as follows :

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

endorsed by Lord Goff of Chievelay in Caswell and Another v. Dairy Produce Quote Tribunal – 1990 2 ALL ER 434. In R. v. Aston University Senate, Ex-parte Roffey – 1969 2 QB 538 at 555C Donaldson J stated :

> ***"The prerogative remedies are exceptional in their nature and should not be made available to those who sleep upon their rights."***

Even if an application is made within the three month period, it may still be considered that there was undue delay. Mr. Sharma referred in his submissions to R. v. Herrod, Ex-parte Leeds Council – 1976 1 QB 540 at 575 A where the Court of Appeal stated :

> *"If there has been unreasonable delay, then even though the application for leave is made within the six months, resulting hardship to an opposing party may well be a reason for refusing the order sought. It is true that the six months can be extended, but only if the delay is accounted for to the satisfaction of the court; and, if it is so accounted for, the question whether the case is a proper one for granting relief will only be answered in the affirmative if the applicant shows that in all the circumstances the demands of justice are best served by that answer. It is for him to show that on balance it is right to make the order and not for an opposing party to show it would be wrong to do so."*

Sedley J in R. v. Chief Constable of Devon, ex-parte Hay – 1996 2 ALL ER 711 stated :

> *"While I do not lose sight of the requirement of RSC Order 53 Rule 4 for promptness, irrespective of the formal time limit, the practice of this court is to work on the basis of the three-month limit and to scale it down wherever the features of the particular case make that limit unfair to the [defendant] or to third parties."*

So one must look at the context and subject matter of the proceedings to consider whether there is undue delay.

WHEN DOES THE 3-MONTH PERIOD BEGIN TO RUN?

The actual decision was made on 23rd March 2006. The records as I earlier stated do not show that the parties were present on the date of ruling. The solicitors for the interested party received notification of the decision on 28th March 2006, so I can presume the applicant would have received it the same day too. For the purposes of calculating the three-month period, the High Court Rule Order 3 Rule 2(2) provides the guiding principle which states :

"where the act is required to be done within a specified period after or from a specific date, the period begins immediately after that date."

The specified date in my view is the date when notice of decision was given to the applicant and not the date of the decision. Actual knowledge of delivery of decision is what triggers the commencement of the three month period. ***"Notice of a decision is required before it can have the character of a determination with legal effect."*** – R. (Anufrijeva) v. Secretary of State for Home Department – (2004) 1 AC 604 at paragraph 26. I therefore conclude that the application was made within the three month period. However that is not the end of the matter. The applicant in this case waited until the very last day to file the application.

SHOULD I GRANT LEAVE?

A factor in considering matters at the substantive hearing is the likelihood of the remedy sought causing substantial hardship or prejudice to the rights of any person or be detrimental to good administration. When the PSC received the notification of appeal, it must or should have realized that the decision was made on 23rd March 2006 and there was need to move expeditiously especially when solicitors for the interested party were asking it for resolution of the matter in view of the decision on appeal. A person's livelihood was affected here; he was not paid any salary, he was at the mercy of the Commission which was obligated to comply with the decision of the PSAB (Section 26(10) of the Public Service Act). On 12th May 2006 the Chairman of the PSC wrote to the interested party that it has decided to challenge the ruling by way of a Judicial Review and further ***"this would hopefully be expeditious in the spirit of High Court review jurisdiction"***. Having said that the Commission went into hibernation.

The PSC is a statutory body entrusted with the functions of appointing, disciplining and removing civil servants which had ready access to legal opinion and resources and it should have acted much faster and not only comply with just

the letter of the three-month rule. I hold that substantial prejudice has resulted by the casual, manner which the PSC adopted in filing this application. It has given no explanation for the delay.

Therefore I consider that I should not grant it leave to apply for judicial review.

In the event I am found to be in error in reaching the above conclusion, then the next issue is whether the PSAB fell into error in considering the effect of the failure of PSC to hold prior investigation before laying charges.

The applicant submitted that on appeal the PSAB could only consider the merits of the appeal and not the procedure adopted by the PSC except in so far as that related to findings of the Commission on the merits. The PSAB cannot treat the appeal as if it were a judicial review application. The appeal the applicant submits is a private law enquiry, confined to merits and merits only.

There is no common law right of appeal. The right to appeal is conferred by a statute. At the appeal a person seeks the aid of a superior court or tribunal to correct any error of court below. An appeal strictly is proceeding in which ***"the question is whether the order of the court from which the appeal is brought was right on the materials which that court had before it"***. – Lord Davey in Ponnamme v. Arumogam – (1905) AC at p. 390.

The contract under which the interested party was employed is part of the record of proceedings. Clause 12.6 of the contract lays out the procedure for termination of contract. Ms A. Uluiviti the PSC representative at the hearing of the appeal told PSAB that clause 12.6 had not been complied with. The PSAB was of the view that since the applicant had failed to comply with the clause 12.6 by failing to appoint an investigator before charging the interested party, the PSC was in breach of contract. It, therefore, allowed the appeal.

The applicant says that this conclusion was not open to the respondent because if an investigation was a condition precedent to the disciplinary proceedings then the Commission had no jurisdiction and therefore its decision was a nullity and therefore there was no decision to appeal from.

Attractive as this argument appears, it fails because the decision was made by the Commission, and a person was terminated. That decision stood unless it was upset on appeal. That is what the respondent did. On an appeal, unlike in a judicial review a Tribunal can canvass much wider ground in considering the merits. It can even consider whether the tribunal or court of first instance had adopted proper procedure in its fact finding exercise. If it forms the view that the procedure adopted was fundamentally flawed or it denied the appellant what he was contractually entitled, it may decide to allow the appeal.

The New Zealand case of Moevau v. Department of Labour – [1980] 1 NZLR 464 can be distinguished. That dealt with the court's entitlement to review an administrative decision to prosecute or not to prosecute a person. Here the interested party was entitled to certain procedural protections which were not provided to him.

Where a tribunal is vested with powers to consider a decision on merits, it can consider the entire evidence on the records and decide whether the ruling in the first instance was either substantively or procedurally incorrect.

The interested party had admitted that he traveled economy class, that he had received refund of difference between the value of business class travel and economy class and that he refunded quite some time later the amount he had received. The PSAB did not consider what are the consequences of failure to appoint a separate investigation. It should have considered what are the consequences of non compliance in the context of all the facts or circumstances of the case including the admission of certain facts by the interested party. The PSAB did not consider what substantive harm was caused by the breach of contract to the interested party. This investigation would have been a superfluous

exercise in any event in view of certain material facts admitted by the interested party. An investigation albeit not at the request of PSC, had already been done by Ministry of Finance and report compiled. The PSC had that report.

Given the state of affairs and the chain of events as they unfolded at the hearing at PSC, the failure by PSC to hold investigations had a virtually nugatory effect on the fact finding exercise.

Accordingly, I am of the view that the PSAB in allowing the appeal should have looked at the effect of the failure to provide a pre-charge investigation whether it caused substantial prejudice to the interested party.

CONCLUSIONS:

The PSAB in the circumstances of this case ought not to have allowed the appeal on the ground of failure of PSC to hold pre-charge investigations. However, given the delay by PSC in bringing these proceedings, I refuse to grant leave for application for judicial review. The appeal is dismissed with costs summarily fixed in the sum of $700.00 in favour of the interested party.

[Jiten Singh]
JUDGE

At Suva
29th November 2006