IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

JUDICIAL REVIEW HBJ No. 02 OF 2008

BETWEEN:

SAVITA DEVI NAIR

APPLICANT

AND:

PERMANENT SECRETARY FOR EDUCATION

FIRST RESPONDENT

AND:

ATTORNEY GENERAL OF THE REPUBLIC OF FIJI

SECOND RESPONDENT

Appearances:
Mr J. Raikadroka for the Applicant
Ms S. Seruilagilagi for the Respondents

Date of Hearing: 4 February 2008
Date of Judgment: 11 February 2008

JUDGMENT

1. Application and Relief Sought

This is an application pursuant to Order 53, Rule 3(2) of the High Court Rules 1998 for leave to apply for judicial review. The Applicant seeks the following relief:

1. An **Order for Certiorari** to remove the First Respondent's decision made on 29 November 2007 into this Court to be quashed.

2. A **Declaration** that the First Respondent's Notification of Transfer to the Applicant is unlawful, invalid, void and of no effect.

3. A **Declaration** that the First Respondent was biased towards the Applicant and acted arbitrarily and/or unreasonably in purporting to transfer the Applicant on 29 November 2007.

4. A **Declaration** that the First Respondent acted in breach of the Applicant's legitimate expectation of being treated fairly and being accorded natural justice.

5. A **Stay** of the First Respondent's decision of 29 November 2007 pending final determination of this judicial review.

6. Costs.

7. Such further order or other relief as this Court may deem just and equitable.

1.1 The Application sets out the main grounds of seeking relief as:

a) The First Respondent acted ultra vires the provisions of Regulation 13 of the **Public Service (General) Regulations 1999 ('the Regulations')** in that they did not carefully follow the guidelines required for transferring the Applicant.

b) The First Respondent was biased against the Applicant in the aforesaid decision in that they were transferring her for speaking out against the Principal of Rishikul Sanatan College in an investigation they carried out.

c) The First Respondent failed to provide reasons for the transfer even though the Applicant made a written request for such reasons.

d) The First Respondent by transferring the Applicant was in a way penalizing her for supposedly speaking out against the Principal during the investigation without giving her an opportunity to respond accordingly.

2. Affidavit in Support

In an Affidavit sworn in support of the Leave Application the Applicant **SAVITA DEVI NAIR** states amongst other matters that she is a School Teacher who joined the Civil Service in 1982 and was confirmed in the position of Vice Principal in the ED2A Grade in January 2007. Since 2001, she has been a Vice Principal ED2A and has 'no blemish to [her] record after twenty five years of service'.

2.1 In paraphrased form, the Affidavit states further as to the history preceding the present application:

- Circa late 2007 an investigation was conducted by the Ministry of Education into allegations against the Principal of Rishikul Sanatan College ('Rishikul');
- Ms Nair was one of many staff questioned by the Investigating Officer;
- On 29 November 2007, Ms Nair received from the Ministry a 28-days Notification of Transfer;
- Ms Nair was thereby advised:
    - she was to be transferred to Mahatma Ghandi Memorial High School (MGM) from 21 January 2008;
    - she should raise any views or concerns re the transfer before 21 January 2008;
    - if she did not, her acceptance of the transfer would be assumed;
    - after considering her views and concerns the Ministry could still transfer Ms Nair if of the opinion that she should still be transferred.
- Ms Nair responded by letter of 3 December 2007, raising her objections against the transfer and saying amongst other matters she believed she 'was singled out for views raised against the principal during the Investigation and asked the Ministry to make a "fair decision in this matter"';

- By letter dated 27 December 2007 the Manager and Principal of Rishikul were informed of Ms Nair's transfer to MGM;
- On 18 January 2008 upon Ms Nair's instructions that day her Solicitors wrote to the Permanent Secretary of the Ministry of Education advising, amongst other matters, that:
    - The Ministry had not yet responded to Ms Nair's letter of 3 December 2007 stating her views against the transfer;
    - Ms Nair 'intends to start the new school year at Rishikul until the Ministry has responded accordingly to her queries' per her 3 December 2007 letter and Solicitor's letter of 18 January 2008;
- On 21 January 2008 at the start of school at Rishikul Ms Nair:
    - reported for duties;
    - 'noticed a commotion ... and found out that the Management had locked the Principal out';
    - without prior notice received a copy of the 27 December 2007 letter;
    - received a visit from the Divisional Educational Officer – Central:
        - who said she 'was supposed to report to MGM not Rishikul';
        - to whom Ms Nair said she 'would only go once the Ministry had responded to [her] query concerning [her] transfer';
- On 22 January 2008 at Rishikul the Divisional Educational Office – Central:
    - handed Ms Nair a Minute written by Mr Buwawa, Deputy Secretary for Education to the Director Secondary Education:
        - seeking a response by 14 January 2008 from the Director Secondary Education;
        - containing written notes Ms Nair presumes were 'made by officers who handled [her] case;
        - which, upon Ms Nair's perusal, contained comments by the Director Secondary made on 17 January 2008, and amongst others the statement:

            > Investigations on the allegations on the Principal concluded that only the Vice Principal of the School is against the Principal hence the need to throw her out as not to disturb the Principal's organisation in the school.

    - told Ms Nair the Ministry would 'cease paying [her her] salary if [she] did not report to MGM;

- (at an unknown date) the Ministry appointed a replacement for Ms Nair at Rishikul.

2.2 Amongst other matters, Ms Nair further states in that Affidavit:

> I have spent twenty five years in the teaching profession and expected to be treated fairly by the Ministry and have suffered much anxiety and stress since receiving the Notification. I have not been able to enjoy my break for the festive season last year as this issue has always been on my mind and this is the first time I have experienced such matters: para 21

3. Submissions by Parties

The application for leave was heard interpartes, the papers having been served on the Respondents in accordance with the ***Pickwick*** principle as set out by Justice Megarry in ***Pickwick***

International Inc (GB) Ltd v. Multiple Sound Distributors Ltd and Anor [1972] 3 All ER 384.[1] I take into account, as was pressed strongly by Counsel for the Applicant, the position expressed in ***Nivis Motors & Machinery Company Ltd v. Minister for Lands & Mineral Resources*** [1998] FJCA 42 (13 November 1998) and ***Naidu v. Attorney-General*** [1999] FJCA 55 (27 August 1999) namely that leave applications should generally be determined on the papers. In the present case, the Court has been considerably assisted by the submissions made by both parties. This has assisted in clarifying the issues, providing a better basis for making this initial decision and assisting in the later hearing of the substantive application.

3.1 Counsel for the Respondents (Permanent Secretary and Attorney General) opposed the application on five principal bases, the fifth going to the question of a stay:

- That Ms Nair had been transferred within the same Ministry and from one school to another within the same district and hence she was not covered by Regulation 13 of the *Public Service Regulations* 1999[2] (Regulation 13), and hence was not entitled to consideration under that provision;
- That because the transfer from one school to another within the Ministry is operational and managerial, Ms Nair's transfer is not subject to judicial review;
- That Ms Nair had not exhausted all remedies available to her, for she had not proceeded through the Public Service Appeals Board and indeed had not made any application or approach to the Public Service Appeals Board to avail herself of that avenue;
- If the Ministry's approach to the Applicant by way of Regulation 13 was relevant (which it was not, as her transfer was not subject to it), the Ministry had in accordance with that provision considered the matters raised by Ms Nair in her letter of 3 December 2007 and taken them into account and then, as it was entitled to do under that provision, continued with her transfer;
- The grant of a stay would serve no useful purpose because it would relate to an executive decision already made.

3.2 Counsel for the Respondents relied upon the provisions of the ***Public Service Act*** 1999 and a number of authorities, including:

- ***Nair v. Public Service Commission*** [2001] FJHC 163 (28 May 2001)
- ***Dean v. Ministry of Education*** [2004] FJHC 418 (14 May 2004)
- ***State v. Public Service Appeals Board, ex parte Karan*** [2002] FJHC 138 (23 July 2002)
- ***State v. Permanent Secretary for Youth, Employment Opportunities & Sport, Ex parte Tuapati*** [2001] FJHC 52 (1 August 2001)
- ***State v. Fiji Islands Revenue and Customs Authority, Ex parte Krishna*** [2004] FJHC 407 (19 April 2004)

3.3 Counsel for Ms Nair submitted that the requirements of a grant of leave were met by the application and supporting Affidavit, emphasising the principles set down in ***Nivis Motors & Machinery*** [1998] and ***Naidu v. Attorney-General*** [1999] as to the granting of leave, and further that Ms Nair had no avenue of appeal through the Public Service Appeal Board: her sole avenue,

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[1] I also note that this approach is a general practice of this Court: ***Kaliova Masau of Ekubu Village and Ors v. Attorney General of Fiji and Ors*** Civil Action No. HBC 120 of 2007L, No. 48/2007 (19 April 2007).

[2] These Public Service Regulations are also referred to as *Public Service (General) Regulations* 1999 in the version obtained through paclii – http://www.paclii.org/fj/legis/num_act/psa1999152/ (accessed 9 February 2008).

it was said, was by way of judicial review. For Ms Nair the discernable statement on the copy Minute provided to her on 22 January 2008 at Rishikul by the Divisional Educational Office – Central was emphasised, namely:

> Investigations on the allegations on the Principal concluded that only the Vice Principal of the School is against the Principal hence the need to throw her out as not to disturb the Principal's organisation in the school.

3.4 Counsel relied upon this statement as 'the' or 'a' (major) factor underpinning Ms Nair's application and a compelling reason for granting leave.[3] The transfer was not made on a professional basis, he submitted, but raised the question whether the Ministry was biased and Ms Nair was labeled a 'troublemaker' so that the transfer came about not because there was a vacancy but because of what she had said in the Ministry's own investigation. It appeared to indicate, Counsel submitted, that the transfer was victimisation and Ms Nair had been victimised. Counsel for the Permanent Secretary and Attorney General responded that the statement was simply 'the view of one of the employees at the Ministry' and that Ms Nair's transfer was upon a proper basis of looking at the best candidate.

3.5 In response to submissions for the Permanent Secretary and Attorney-General that Regulation 13 was not relevant to Ms Nair's transfer, Counsel for Ms Nair said that because Regulation 13 had been followed at least insofar as the first two steps – of notification and request for a response from Ms Nair, and Ms Nair's response – then the Permanent Secretary could not rely upon 'transfer' as defined in the Regulations as eliminating Ms Nair's right to rely upon Regulation 13 and (as was contended) the Ministry's failure to fully comply with it.

3.6 Counsel for Ms Nair said that the 'Ministry's authority to transfer was respected, but it must be done in accordance with the Regulations, and fairly'. There were 'two strong triable issues' – that going to Regulation 13 (non)compliance, and the 'victimisation' head.

4. Application of Principles re Grant of Leave to Apply for Judicial Review

In an application for leave to apply for judicial review, the Court must ask:

- Does the applicant have sufficient interest in the application;
- Is the decision susceptible to judicial review – that is, is it of a private or public nature;
- Is the decision non-reviewable in accordance with the terms of the ***Public Service Act*** 1999;
- Are alternative remedies available to the applicant and, if so, have they been pursued by the applicant;
- Does the material available disclose an arguable case favouring the grant of the relief sought, or what might, on further consideration, be an arguable case.[4]

4.1 ***(a) Ms Nair's Interest:*** The answer here must be 'yes', Ms Nair has a sufficient interest in the application: she is a school teacher employed by the Ministry of Education and comes within the Ministry's administrative control.[5] The decision in relation to which leave is sought for review relates directly to her. She is its subject, she is directly affected. Ms Nair has standing.

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[3] Together with the failure to comply with Regulation 13 of the Public Service Regulations.

[4] See ***Fiji Airline Pilots' Association v. Permanent Secretary for Labour and Industrial Relations*** (Civil Appeal No. ABU0059U of 1997, 27 February 1998), citing Lord Diplock in ***Inland Revenue Commissioners v. National Federation of Self Employed*** [1982] AC 617, at 644; see also ***National Farmers' Union v. Sugar Industry Tribunal and Ors*** (CA 8/1990, 7 June 1990).

4.2 ***(b) Decision of a Private or Public Nature:*** In ***Dean***, the Court held that the decision in question was of a private, not a public, nature and therefore not susceptible to judicial review. There, the Acting Senior Education Officer, Luatoka/Yasawa had decided to transfer the applicant from the post of Assistant Head Teacher ED5B Lautoka Muslim Primary School (LMPS) to Lautoka Central Primary School as Assistant Teacher ED8A on her existing terms and conditions of service. A teacher for more than 30 years, she had taught at LMPS for some years. Prior to the decision to transfer, she had been referred to a medical board after absences through ill health. The medical board reported she was fit to continue as a teacher, that she should attend a doctor if she fell ill, and that she be transferred to another school. The Court held that the decision sought to be reviewed was not of a public but a private nature. The Court's decision was based in the proposition that the transfer in question was 'private' because 'transferring the applicant from one school to another is an operational or management decision and is not a decision that is amenable to judicial review ...': at 4

4.3 The decision rested upon an earlier High Court decision, ***State v. Fiji Islands Revenue & Customs Authority and Silipa Tagicaki Kubuabolan; Ex parte Barbara Malimali*** [2003] FJHC 100 (9 April 2003) (***FIRCA; Ex parte Malimali***).[6] However, perusal of ***FIRCA; Ex parte Malimali*** indicates that the facts of that case were very different indeed, and the basis and rationale of the decision are wholly distinguishable from the present case.[7]

4.4 In ***FIRCA; Ex parte Malimali*** the Court found that the Applicant had an arguable case and a sufficient interest in the matter upon which the application was based. She could, too, 'assert that there has been a breach of natural justice in the decision to appoint someone other than her, to the acting position of Manager, Legal': at 2

4.5 However, the Court in ***FIRCA; Ex parte Malimali*** addressed two bases upon which it was contended that the decision there was private, not public and hence not open to judicial review. First, the Court found that there was an alternative remedy – through the Collective Agreement which contained dispute and grievance procedures covering all employees under its scheme, including the Applicant, and which rendered the matter 'private' not 'public':

> ... The authority and the Associating/Unions agree that all employees have the right to seek redress for grievances relating to their terms and conditions of employment and their entitlements: para 61.1, Chapter 7, Collective Agreement

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[5] See ***Dean v. Ministry of Education*** [2004] FJHC 418 (14 May 2004), at 3.

[6] ***FIRCA; Ex parte Malimali*** is listed in paclii under the heading ***State v. Fiji Islands Revenue & Customs Authority; Ex parte Tagickai*** [2003] FJHC 100 – that is, naming the Interested party as the applicant, under her middle name – her full name being Silipa Tagicaki Kubuabola: http://www.paclii.org/fj/cases/FJHC/2003/100.htm (accessed 9 February 2008). The heading itself is correct; however the listing in the aforesaid manner can lead to difficulty in locating the case.

[7] This decision is necessarily canvassed in some considerable detail because the Respondents relied upon ***Dean***, itself reliant upon ***FIRCA; Ex parte Malimali*** and by reason of the judicial comity proposition upon which ***Dean*** relied. Because ***FIRCA; Ex parte Malimali*** is wholly distinguishable, it does not apply here. I set out the facts and rationale illustrating why. Further, ***State v. Fiji Islands Revenue and Customs Authority, Ex parte Krishna*** [2004] FJHC 407 (19 April 2004) appears to rely wholly on ***FIRCA; Ex parte Malimali***, however, as will become clear, the latter is dependent upon and distinguishable on its facts – as outlined below – from the present case, and in my view the rationale does not conflict with my determination herein.

4.6 Despite the Applicant's contention that the grievance procedure was not intended nor adequate to cover the situation facing her, the Court said it was 'nevertheless ... of the view that the procedures and processes of referral and hearing of submissions on grievances at every stage, envisaged at the initial level of grievance at any rate, that all matters pertaining to an individual's employment with FIRCA, could be addressed' under it. The Applicant 'has not exhausted all alternative remedies ... available to her': at 4

4.7 The second basis argued by the Respondent for 'private' not 'public' was that the decision applied only in respect of an acting position; hence, it said, judicial review did not apply. The Court noted the following contentions put as supporting this proposition:

> The fact that the position of Manager, Legal, is an acting capacity, does not confer upon her any permanent right to the position. The post is being advertised and a more permanent appointment will be made thereafter. Until such an appointment, the position is transitory: at 4

4.8 The Court itself had said:

> For the Applicant to succeed, she must show that the activity complained of is of a public nature. It would be difficult to convince this Court to agree to the proposition that the decision to appoint an Acting Manager Legal for a period of 3 months, falls within this exception. The decision amounts to no more than a management holding action to allow the selection of the new Manager, Legal to be made. I cannot see how it can be elevated beyond that status to one of a 'public nature' and thence a 'public law issue' which may be resolved by way of an application for judicial review: at 3

4.9 His Honour went on to consider this aspect:

> Judicial review is the process by which the courts exercise supervisory jurisdiction over the activities, including decisions of public authorities. Is an acting appointment decision also included as a proper subject of judicial review?
>
> ...
>
> The issue in my view, is really one of conclusiveness of a decision or decision-making process. Certainly, the Courts have held in the past that it is possible to seek a review in the decision-making process before the process is completed and a final decision is reached. Similarly, one may seek to review a preliminary decision such as a decision refusing an adjournment ...
>
> The question in this case remains whether the decision of FIRCA for the appointment of the Interested Party as acting Manager, Legal is subject to judicial review. This in turn depends on whether such a decision is a final decision as compared to a preliminary or interlocutory one. In this Court's view, the decision to an acting appointment notwithstanding the fact that is by its nature a temporary one, amounts to a final decision. It is final insofar as to the appointment and the duration of the acting capacity made and decided.
>
> Having arrived at the conclusion that a decision to make an acting appointment is a final decision, the question arises whether it follows that all and such matters remain subject to judicial review [as 'public' rather than 'private']: at 4

4.10 Earlier, the Court noted:

> Counsel for the respondent ... submits that there is no public law element to the [Applicant's] grievance. Such matters are covered by the Appellant's Letter of Appointment and the Collective Agreement between the Employees and FIRCA, and as such can only be subject to private law. Counsel referred for example to ***R. v. East Berkshire Health Authority; Ex parte Walsh*** [1985] QB 152, where the Court decided that a claim in connection with the dismissal of an employee from an employment with a public authority, where the conditions of employment are governed by a statutory instrument, are properly a matter for private, not public law.
>
> The law is clear. While it is true that FIRCA is a creature of statute and performs a public function, this does not necessarily mean that every decision personal to individual employees of FIRCA including the Applicant: at 3

4.11 The Court looked at decisions of the Privy Council and English Court of Appeal. In the latter case, ***Regina (Tucker) v. Director General of the National Crime Squad*** (Unreported, January 2003), on appeal the possibility was taken into account that the High Court had concluded there was public law jurisdiction for the decision in question to be reviewed, because the applicant had no contract of employment and no private law remedy, as well as the Crime Squad's being a public body created by statute to perform public law functions.

4.12 In ***FIRCA; Ex parte Malimali*** His Honour continued:

> The Court of Appeal, however, held that even in such situation, the Court must look further and focus on what the Director General of the Squad was doing when he made the decision. For example, the impugned decision did not affect the applicant's status as he retained his rank. And while it was true that the crime squad performed an important public function, it did not necessarily mean that every decision personal to the applicant involved public law remedies. It concluded that there was a line over which the Courts should not or could not go. The Court ruled that the police were entitled to run their affairs concerning operational or management decisions without the intervention of the Courts and therefore those matters, as distinct from disciplinary issues, were not amenable to judicial review. In respect of the decision to terminate the appellant's secondment, the matter was essential an operational or management decision not subject to judicial review: at 5

4.13 In ***FIRCA; Ex parte Malimali*** the Court observed that the decision there in question was of limited duration and effect and, as the Court described it, 'ephemeral':

> In accordance with the terms of the appointment letter, the Interested Party's acting appointment is for a period of three (3) months only and to expire on 23 March 2003. As is the normal occurrence in any organisation, such a scheme is put in place to allow the management adequate time and space to find a suitable permanent appointment to the post. The decision is ephemeral. The [Applicant] does not in effect lose her position in the organisation, nor is she prevented from applying for the post when advertised. She therefore still has the opportunity to be appointed to the position provided she satisfies the criteria set by the appointment authority.

4.14 The Court concluded:

> Whatever will be the outcome of the search by FIRCA for a new Manager Legal, the fact of the matter is, insofar as the action of the Chief Executive and the Board is concerned in deciding an acting appointment in the meantime, such a matter is properly within the competence and the domain of operational or managerial decisions of the organisation. This category of decisions, the Court holds, are not amenable to judicial review: at 5-6

4.15 What are the implications of ***FIRCA; Ex parte Malimali*** for the present application?

4.16 Ms Nair continues to hold her level of Vice Principal and substantive status within the teaching profession (Vice Principal in the ED2A Grade gained in January 2007) and the Ministry. However, she was not on secondment at Rishikul, and the decision to transfer her was not one aimed at ending or 'undoing' a secondment – which was the case in ***Regina (Tucker)*** upon which the Court in ***FIRCA; Ex parte Malimali*** relied. The post at Rishikul is not a secondment, nor a temporary or acting appointment; nor is the post at MGM. For Ms Nair, there is no return to a status quo, as was so for the appellant/applicant in ***Regina (Tucker)***. Unlike the case of the applicant in ***FIRCA; Ex parte Malimali***, it is not a case of another employee 'acting' in the position at Rishikul which Ms Nair held. Unlike the situation in ***FIRCA; Ex parte Malimali***, there is no 'final decision' to be made in the future.

4.17 The decision here in question is said by the Ministry to be final; it affects Ms Nair's posting and teaching career for the longterm future; it affects her placement and the school to which she is assigned as a permanent, not a temporary, matter. No one is 'acting'.

4.18 To return to the Court's words in ***FIRCA; Ex parte Malimali***:

> The decision amounts to no more than a management holding action to allow the selection of the new Manager, Legal to be made. I cannot see how it can be elevated beyond that status to one of a 'public nature' and thence a 'public law issue' which may be resolved by way of an application for judicial review: at 3

4.19 The Court in ***Dean v. Ministry of Education*** upon which the Permanent Secretary and Attorney-General rely goes substantially beyond the ratio of ***FIRCA; Ex parte Malimali*** although its explicit foundation for its decision is found in the latter case. It is my respectful view that ***FIRCA; Ex parte Malimali*** does not support the proposition that any transfer of a teacher is 'an operational or management decision and is not a decision that is amenable to judicial review'.[8]

4.20 I observe, as the Court in ***Dean*** noted, citing ***FIRCA; Ex parte Malimali***:

> The question whether the court will intervene will depend on the nature and consequences of the decision being impugned, not on the personality or individual circumstances of the person called on to make the decision: ***FIRCA; Ex parte Malimali***, at 8; ***Dean***, at 3

4.21 In the present case, it appears clear from the material before the Court and submissions made by Counsel for Ms Nair that it is not a question of the 'personality or individual

[8] ***Dean*** [2004] FJHC 418, at 4: http://www.paclii.org/cgi-bin/disp.pl/fj/cases/FJHC/2004/418.html?qu (accessed 1 February 2008).

circumstances' of the decision-maker, but 'the nature and consequences of the decision being impugned' which is in issue.[9]

4.22 Hence, in my view, ***FIRCA; Ex parte Malimali***[10] does not lend support to the decision affecting Ms Dean being private, not public; nor does it support the notion that the decision is 'operational or managerial', or within the domain of operational or managerial decisions of the Ministry and so outside the scope of judicial review. Even apart from all the distinguishing features, there is an issue of victimisation put forward by the Applicant. That in itself raises an arguable issue bringing the matter into the domain of public law and may, in the way that it is propounded, raise questions of rights under the Constitution. Can a decision alleged to be of this nature be one that falls into the category of 'operational or managerial'? It appears to me that at least an opportunity to agitate this issue should be provided to both parties within the scope of judicial review.[11]

4.23 Ms Nair has been affected by a decision which is not 'private' as in 'operational or managerial' used in ***FIRCA; Ex parte Malimali***. It is a decision susceptible to a public law remedy.

4.24 ***(c) Decision non-Reviewable per the Public Service Regulations 1999***: The Public Service (General) Regulations define 'transfer' as:

> ... not includ[ing] the movement of an employee between positions in the same Ministry or department unless the movement requires the employee to change his or her residence from one station to another: s. 3

4.25 The decision in ***State v. Fiji Islands Revenue and Customs Authority; Ex parte Kirshna*** [2004] FJHC 407 relies upon the proposition that the movement of an employee between positions in the same Ministry or department including from one station to another is not a public law determination. However, in that case, there was a Collective Agreement (CA) and it was as a consequence of the transfer's being in accordance with the CA's provisions that the Court said it was 'not a public law determination'. However, the Court then went on to say:

> ... it is difficult to conceive of situations where the transfer of employees of a public authority from one station within Fiji to another would not be a managerial decision. It is a decision relating clearly to the operation of the authority ... and is not amenable to judicial review: at 4

4.26 Yet the Court again relied upon ***FIRCA; Ex parte Malimali***, expanding the statement so applying it to the facts of the case in issue:

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[9] If 'every' transfer *is* indeed 'operational or managerial', therefore 'private' not 'public' and outside the scope of judicial review (a proposition with which I do not agree) then ***Dean*** is nonetheless distinguishable from the present case, on such a basis as to render the decision to transfer 'public' so as to bring it within the scope of judicial review. On this, see further later.

[10] And the authority upon which it relies.

[11] I note here that the facts of ***Dean*** may have given rise to a similar issue however it was not explored and hence evidently not raised by the parties or Applicant. The transfer and demotion (albeit the Applicant retained her salary and benefits levels) appears to have been wholly premised upon her health condition. This may have provided some cause for apprehension as to possibilities arising under the Constitution as to differential treatment on the basis of disability. Had this been raised as an issue, it may be that the Court in ***Dean*** would have decided otherwise.

Whatever will be the outcome of the search by FIRCA for a new Manager Legal, the fact of the matter is, insofar as the action of the Chief Executive and the board is concerned in deciding an acting appointment in the meantime, such a matter is properly within the competence and the domain of operational or managerial decisions of the organisation. This category of decisions, the Court holds, are not amenable to judicial review.

4.27 As noted, ***FIRCA; Ex parte Malimali*** was about a temporary, acting position and albeit the decision in question was 'final', the ultimate outcome remained open: the acting position was for three months only, pending advertisement and search for a permanent appointment to the post in question. This is, as noted, distinguishable from the present case.

4.28 Returning to Regulation 13, in the present case, the decision in question was that Ms Nair, the employee, be moved 'between positions in the same Ministry or department', with no requirement that she 'change ... her residence from one station to another'. Hence, 'transfer' as defined in the Public Service Regulations is said by the Permanent Secretary and Attorney-General not to apply to Ms Nair so that she has no rights under Regulation 13.

4.29 Regulation 13 provides:

Division 3 : Transfers

Notice of transfer etc

13. The Commission may transfer an employee without the employee's agreement only if the Commission has –

(a) given the employee 28 days written notice of the transfer;
(b) given the employee an opportunity to state his or her views about the transfer; and
(c) considered any views stated by the employee.

4.30 As noted, for Ms Nair it is said that as this provision was acted upon by the decision-maker, the decision-maker cannot now resile from it. It is said that the Permanent Secretary is, effectively, estopped from going back upon the assurance given to Ms Nair that Regulation 13 or at least a process mirroring Regulation 13 would be applied to decision-making vis-à-vis her and that she had and has a legitimate expectation that it be followed. This legitimate expectation, she says, was not met – because her letter of 3 December 2007 was never responded to and the matters she raised therein were never given consideration as required by Regulation 13(c). As noted, the Permanent Secretary's position is that Regulation 13 did not and does not apply and, in any event, Ms Nair's views were 'considered' (so in accordance with Regulation 13).

4.31 In my opinion, this does not remove the decision in question from the purview of judicial review. It indicates that there is an arguable issue going to the process of decision-making:

- Does an employee in relation to whom Regulation 13 does not apply have a legitimate expectation that any decision to transfer her/him must abide by the terms of that Regulation if the process under the Regulation is followed not withstanding its inapplicability?
- Is the decision-maker bound by Regulation 13 or the Regulation 13 process in making a decision to transfer an employee where, albeit that employee does not come within the terms of Regulation 13, its terms are applied in the decision-making process?

- Is the decision-maker estopped from contending that Regulation 13 does not apply so as to govern the decision-making process, when the decision-maker has commenced the decision-making process by reference to it or at least its terms?
- Was the decision made in accordance with the provisions of Regulation 13 in any event, with the issues raised in Ms Nair's letter of 3 December 2007 given consideration by the decision-maker as Regulation 13 requires?

4.32 ***(d) Alternative Remedies***: For the Permanent Secretary and Attorney-General it is said that Ms Nair has not pursued her alternative remedies, so leave should not be granted. She has a remedy, it is said, under the Public Service Act. As she is contending the decision was 'victimisation' for her 'speaking out', this can be dealt with by the Public Service Appeal Board (Appeal Board) as a disciplinary matter. For Ms Nair it is said there are no alternative remedies. The contention that this is a 'disciplinary matter' and hence susceptible to review through the Appeal Board is not tenable, says her Counsel, because no disciplinary action as such has been commenced against her. Hence, no review lies through the Appeal Board.

4.33 The Appeal Board is continued in its existence[12] under Part 5 of the Public Service Act. Section 25 sets out the basis upon which an appeal may be made to the Appeal Board:

> *Rights of appeal*
>
> 25(1) Subject to this section, every employee, other than an employee on probation, may appeal to the Appeal Board under this Part against –
>
> (a) the promotion of any employee, or the appointment of any person who is not an employee, to a position in the public service for which the appellant has applied by way of promotion;
> (b) the taking of disciplinary action against the appellant; or
> (c) the transfer of the appellant from one district to another within the Fiji Islands.

4.34 No promotion is in issue here. In relation to the transfer as a transfer, Ms Nair has no avenue of appeal through the Appeal Board. The decision to transfer Ms Nair from Rishikul to MGM was not as to a transfer 'from one district to another within the Fiji Islands'. The only possible provision is (b) the taking of disciplinary action against the applicant. Is the onus on Ms Nair to lodge an appeal under this provision? If so, she should have done so within 21 days of the date upon which the decision to transfer her 'was published or notified to [her]': s. 26(1)(a) or 'within any further time allowed by the Appeal Board on sufficient reason being shown by [her]: s. 26(1)(b)

4.35 If notification is determined to be 29 November 2007 when Ms Nair received a twenty-eight days 'Notification of Transfer' saying she was to be transferred to MGH with effect from 21 January 2008, Ms Nair is well beyond the 21 days for appeal. On the other hand, if notification is taken from 21 January 2008 when the Divisional Educational Officer – Central attended at Rishikul and spoke with Ms Nair about her being required to be at MGM, then if weekend days are calculated within the twenty-one days from the date upon which Ms Nair received notice (21 January 2008), this period expires at the start of the week commencing 11 February 2008.[13] If notification is taken to be the date upon which she received the Minute containing the

[12] From the ***Public Service (Amendment) Act*** 1998 (No. 58 of 1998).
[13] Under Regulation 29

handwritten note including the 'throwing out' remark, then the relevant date is 22 January 2008.[14] If she is obliged to take action in the Appeals Board, then she will have to act promptly.

4.35 As to discipline, the Public Service Act says:

Ground for discipline

7. A breach of the Public Service Code of Conduct by an employee is a ground for disciplinary action under the regulations of the relevant Commission or, in the case of a person to whom Part 4 of the Constitution applies, for removal under that Part.

4.36 The Public Service Regulations cover conduct and discipline, which are interrelated. 'Conduct' is outlined in Part 4, and covers:

- Engaging in another occupation for reward;
- Holding office in a local ('public') authority;
- Absence without leave;
- Employee to report legal proceedings: Regs18-21

4.37 'Discipline' appears in Part 5, which says:

Part 5-DISCIPLINE

Disciplinary action

22. (1) If the Commissioner is satisfied that the employee has breached the Public Service Code of Conduct, the Commissioner may –

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

4.38 The only possible category is 22(1)(c). However, the problem confronting Ms Nair is that her transfer has not been characterised by the Permanent Secretary as a disciplinary measure. Indeed, the proposition is that the transfer is not related to matters at Rishikul involving Ms Nair's participation in the investigation conducted by the Ministry. Therefore, Ms Nair would have to go the Appeal Board not only to persuade them that she has engaged in no action warranting discipline nor is her transfer appropriate on the ground of discipline, but that there was any discipline involved here at all. Is it able to be assumed that this is not an onus ordinarily lying with an employee going through the Appeal Board?

[14] It appears that it was only at that date Ms Nair was alerted to what she now puts forward as 'bias' in the decision-making or 'victimisation'. Hence it would be at that date only that she could be taken as having to contemplate the possibility of an appeal to the Appeal Board, if the transfer could be characterised as 'disciplinary'.

4.39 Additionally as an issue here, it would appear that to qualify for Appeal Board jurisdiction, Ms Nair may be required effectively to 'compose' the disciplinary notice of the Permanent Secretary as the basis for her appeal. That is, not having such a notice as not having been issued with one, she will need to put her own composition forward to the Appeal Board as the basis for an appeal. It can be argued that she need simply put forward the document upon which she relies for 'victimisation' in this application. However, is that the usual process? It appears that the disciplinary process commences with a 'charge'. There is no charge levied against Ms Nair here. Arguably this creates another discrepancy insofar as the submission that Ms Nair should exhaust her remedies by going through the Appeal Board process.

4.39 It seems to me that the notion that Ms Nair should commence an appeal through the Appeal Board on the basis that she claims victimisation which might be characterised as 'discipline' does not come within the principle that an applicant for judicial review should exhaust all alternative avenues of redress. It places upon Ms Nair, or potentially places upon her, an onus – as noted, a double onus - that it may fairly be assumed no other employee confronting the Appeal Board appealing against a disciplinary decision and measure bears.

4.40 For the sake of completeness, I observe that the Regulations do cover 'grievances', and it may be argued that Ms Nair has a 'grievance' in her contention as to victimisation. Yet the Regulations themselves do not provide an avenue of redress:

Part 7 – GRIEVANCES

General policy

27. Chief executives should achieve and maintain Workplaces that encourage productive and harmonious working environments and that are able to deal with employees' concerns quickly and fairly.

Procedures for grievances

28. (1) A chief executive must put in place, in his or her Ministry or department appropriate procedures for employees to seek review of action that they consider adversely affects their employment.

(2) The procedures referred to in subregulation (1) must establish an appropriate balance between the needs of the employee for fair review, and the needs of the Ministry or department in achieving results and managing performance.

(3) If a Ministry includes a department –

(a) the head of department need not put in place procedures under this regulation for the department if the Secretary of the Ministry has put in place procedures that cover the department;

(b) the procedures put in place by the Secretary of the Ministry under this regulation need not cover the department if the head of department has put in place procedures for the department.

(4) In this regulation, action includes refusal or failure to act.

4.41 It may be that the Ministry has a grievance procedure, however, this was not a matter put forward at the application for leave. I appreciate that the Permanent Secretary and Attorney

General were served on 30 January 2008.[15] On 1 February 2008, with appearances for all parties, the matter was adjourned to 4 February 2008 to enable the Respondents to locate the relevant file and respond.[16] On 4 February Counsel for the Permanent Secretary and the Attorney-General most competently covered the issues, providing the Court with a number of pertinent authorities. As noted, Counsel explicitly referred to the Appeal Board as an alternative which, in light of Ms Nair's characterisation of the transfer decision as 'victimisation', Ms Nair had not pursued. At that time, however, no grievance procedure as an alternative was referred to and I therefore am unable to say that Ms Nair has an alternative remedy in that regard. To deny leave on the speculative basis that a grievance policy exists per Regulation 28 and that in turn it provides an alternative avenue of redress for Ms Nair would be wrong.

4.42 In my opinion, it is not the case that Ms Nair has failed to pursue any alternative remedy open to her. This head does not therefore stand in the way of her application for leave.

4.43 ***(e) An Arguable Case***: Does Ms Nair have an arguable case? Here, I observe the statement made by the Court of Appeal in ***Naidu v. Attorney-General*** [1999] FJCA 55 (27 August 1999):

> First, in our view this application for leave ought to have been granted on the papers. It was obvious from the statement of claim that an issue of significant public interest was involved. Whether the plaintiff had sufficient standing, and *whether the court should exercise its discretion to grant relief, are matters to be determined finally on the hearing of the application for review.*
>
> Secondly, we emphasise that this decision is only that leave should have been granted. This is on the basis that the plaintiff has established an arguable case in favour of the court making the declaration sought. *It will be for the court hearing the substantive action to determine whether the Minister acted outside his powers, and whether in those circumstances and having regard to the interests of the plaintiff in the proceedings, any relief should or should not be granted. On those issues we have expressed no concluded view*: at 8 (Emphasis added)

4.44 That of course applies here. This Court has made no determination as to whether the case put forward by the Applicant is more than an arguable case. It is that question only which the Court must address at this stage.

4.45 Earlier, at paragraph 4.31, a number of issues are set out which the Court considers provide an arguable case for the Applicant. I do not repeat them. The Applicant has also raised bias, together with a 'fail[ure] to provide reasons for the transfer even though the Applicant made a written request for such reasons', and that by 'transferring the Applicant [the First Respondent] was in a way penalising her for supposedly speaking out against the Principal during the investigation [at Rishikul] without giving her an opportunity to respond accordingly'. These matters raise questions of natural justice or procedural fairness in the decision-making process.

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[15] As noted earlier the ***Pickwick*** principle was followed by the Court, which meant that because there was an urgency in the matter (the school year having begun and the need to resolve the application being subject to a short timetable), fault does not lie with the Applicant in timing of service.

[16] I note here that from 28 January 2008 a cyclone/hurricane affected utilities, services, roads and housing in Fiji causing not inconsiderable disruption to business and public administration. This disruption was beyond the control of those affected, including government departments and their officers. On 29 and 30 January 2008, public servants were directed to remain or go to their homes for safety reasons.

4.46 The Court has no information before it as to the nature or terms of the investigation referred to, nor how it was conducted or whether those who were questioned were given any assurances as to confidentiality or that they were being asked to provide their honest views about the matters upon which they were providing information and that they would suffer no negative repercussions as a consequence. A considerable body of work relates to 'Public Interest Disclosure', colloquially called 'whistleblowing', and 'victimisation'.[17] Various jurisdictions have passed laws specifically aimed at protecting those who do provide information through proper channels about matters of public concern in their place of employment, for example.[18] I emphasise, as noted, there is no information before the Court upon which any determinations can be made on such matters in the context of Ms Nair's claim and again refer to the statement of the Court of Appeal in ***Naidu v. Attorney-General*** noted earlier. I allude to these matters only to observe that there is a public interest in ensuring that decision-making relating to an employee in Ms Nair's position is not based upon nor influenced by that employee's having given information in accordance with a request by the employer and in a process of investigation established and conducted by the employer – that is, public interest disclosure. This is not a matter that can or should be determined at this stage, particularly as the Respondents have had no opportunity to address the matter with their own evidentiary material.

4.47 Although no Public Interest Disclosure legislation exists in Fiji, protections exist under the Constitution in respect of speech. Ms Nair states that she believes she 'was penalised for speaking out against the Principal during the investigation by being transferred and this is not only unreasonable but also very unfair': Affidavit, filed 24 January 2008, para 16

4.48 The Constitution affirms:

> *Freedom of expression*
>
> 30. (1) Every person has the right to freedom of speech and expression, including:
>
> (a) freedom to seek, receive and impart information and ideas; ...
>
> *Equality*
>
> 38. (1) Every person has the right to equality before the law.
>
> (2) A person must not be unfairly discriminated against, directly or indirectly, on the ground of his or her:
>
> (a) ...

---

[17] See for example ***APS Values and Code of Conduct in Practice***, Chapter 15, 'Whistleblowing – Relevant Values and elements of the Code of Conduct, http://www.apsc.gov.au/values/conductguidelines17.htm (accessed 10 February 2008).

[18] See for example ***Bill C – 25 Disclosure Protection Act*** 2004 (Canada), http://www.cbc.ca/news/background/whistleblower/ (accessed 10 February 2008); ***Public Interest Disclosure Act*** 1998 (UK), http://www.opsi.gov.uk/acts/acts1998/ukpga_19980023_en_1 (accessed 10 February 2008). Section 47B(1) provides that a worker 'has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure'.

(b) opinions or beliefs, except to the extent that those opinions or beliefs involve harm to others or the diminution of the rights or freedoms of others;

or on any other ground prohibited by this Constitution.

4.48 Whether these provisions have any application or not is not a matter to which consideration might be given.

4.49 On all the material before me, and taking into account the relevant authorities and submissions made by Counsel for the parties, I find that Ms Nair has an arguable case. Further, having taken into account the relevant authorities and submissions by Counsel for the parties and the material before me, she is not precluded from the judicial review process.

5. Application for Stay

The Applicant also seeks a stay of the Permanent Secretary's decision of 29 November 2007, pending final determination of the judicial review. Two matters are raised here by Ms Nair. She states:

- on 22 January 2008 she was told by the Divisional Educational Officer – Central that the 'Ministry would cease paying me my salary if I did not report to MGM': Affidavit of 24 January 2008, para 17
- 'the Ministry has appointed someone else to replace me at Rishikul ...: para 18

5.1 Ms Nair goes on to state that she 'seek[s an injunction][19] against the Ministry to prevent them from allowing the replacement Vice Principal to take my place pending the determination of my application as his presence would no longer be needed while I'm there': Affidavit of 24 January 2008, para 19

5.2 For the Respondents, it is said that a stay would 'serve no useful purpose as "it can have no possible application to an executive decision which has already been made"', citing ***State v. Public Service Appeals Board; Ex parte Karan*** [2002] FJHC 138 (23 July 2002), itself relying upon an opinion of the Privy Council, per Lord Oliver of Aylmerton, in ***Minister for Foreign Affairs, Trade and Industry v. Vehicle and Supplies Ltd*** (1991) 1 WLR 550, at 556.

5.3 In determining in ***Ex parte Karan*** that a stay granted ex parte should not be continued, the Court referred forcefully to a number of decisions, including ***The State v. Public Service Commission; Ex parte Epeli Lagiloa*** (1994) 40 FLR 237.

5.4 In ***Ex parte Epeli Lagiloa*** the Applicant sought an Order that the Respondents be restrained by injunction from effecting the Applicant's termination per a letter of advice dated 24 June 1994. Under Order 53, Rule 3(8)(a) (which remains in the same terms):

Where leave to apply for judicial review is granted, then:

(a) if the relief sought is an order of prohibition or certiorari and the Court so directs, the grant shall operate as a stay of the proceedings to which the application relates until the determination of the application or until the Court otherwise orders;

[19] The application as noted seeks a stay: Application for Leave, 24 January 2008, para 1(e).

(b) if any other relief is sought, the Court may at any time grant in the proceedings such interim relief as could be granted in an action begun by writ.

5.5 ***Ex parte Epeli Lagiloa*** canvasses extensively the authorities in this country and in the United Kingdom, including decisions of the Privy Council (arising out of the Carribean) on injunctions and stays, their similarities and differences, their application or lack of application against the Crown, Ministers of the Crown and local authorities; their scope and efficacy; and the ongoing debate within the authorities on the question. His Honour came to a determination that as an injunction:

> ... is not available against the State because of the statutory provisions in ... section 15 of the Crown Proceedings Act, then how can or why should an interim injunction or stay which has the same effect as an interim injunction according to ***Vehicles and Supplies Ltd*** [[1991] 1 WLR 550] be granted against the State. In the context of this case on stay in relation to our Or 53 r. 8 Lord Oliver in ***Vehicles and Supplies Ltd*** said that 'it can have no possible application to an executive decision which had already been made'. In fact in ***Factortame*** the House of Lords have gone so far as to hold that 'the court has no power to grant an interim injunction' against ministers in the judicial review proceedings 'because injunctions have never been available at common law in proceedings on the Crown side' and that position had been effectively preserved by ... section 15 in our case.
>
> For the aforesaid reasons, neither the application for injunction nor stay can be granted against the State: at 246

5.6 As the Court recognised, however, a distinction has been drawn between the grant of an injunction and the grant of a stay. His Honour summed up 'the present position regarding principles governing the grant of a stay according to [***Judicial Remedies in Public Law***] as follows:

> The principles governing the discretion to grant a stay have yet to be worked out by the court. There is some guidance on the principles governing interim injunctions ... Similar principles are likely to be applied to stays, at least in relation to public bodies other than Ministers. The position on stays in as far as ministers are concerned is unclear: p. 155

5.7 In ***Ex parte Epeli Lagiloa***, the court acknowledged that in ***State v. Secretary, Public Service Commission; Ex parte Joeli Nabuka*** [1994] FJHC 79 (12 July 1994)(Judicial Review No. 8/94) the Court had denied a stay whilst recognising the Court's power to grant a stay:

> ... and proceeded to apply the principles governing the granting of injunctions in considering whether to grant a stay or not. His Lordship was of the view that the status quo should be preserved and he did not think that the applicant should be reinstated to his former position pending the hearing of the action: at 246

5.8 In making my determination in the present case, I have had regard to the authorities and particularly to the two decisions of this Court referred to. It seems to me that each of those cases turns on its facts despite in the one instance the Court recognising a discretion to grant or deny a stay, and in the other the Court's determining against a discretion to grant or deny a stay. The outcome, in the end, is otherwise identical. In making this observation, I emphasise that the Court in each case must of course be taken as assessing principle separately from the facts of the particular case. At the same time, it appears to me that in each case the Court was confronted with a fact situation which dictated the outcome as to refusal of a stay. As there is no settled view on

the question – two conflicting decisions of this Court, and conflicting decisions of the Privy Counsel and English Court of Appeal, and affirmation within the legal academic community of this conflict as yet unresolved, it is my duty to make a determination as to principle, and in relation to the facts in this case. I am not unmindful, also, of the Constitutional affirmation of the inherent jurisdiction of this Court as a superior court of record:

> Each of the High Court, the Court of Appeal and the Supreme Court has the jurisdiction, including the inherent jurisdiction, conferred on it (or, in the case of the Court of Appeal, conferred on the Fiji Court of Appeal) immediately before the Commencement of this Constitution and any further jurisdiction conferred on it by this Constitution or by any written law: s. 119

5.9 Inherent jurisdiction exists:

- to ensure convenience and fairness in legal proceedings;
- to prevent steps being taken that would render judicial proceedings inefficacious;
- to prevent abuses of process; and
- to act in aid of superior courts and in aid or control of inferior courts and tribunals.[20]

5.10 Lacey expands on these four primary functions to define inherent jurisdiction as having the following scope:[21]

(1) Ensuring convenience and fairness in legal proceedings –

- Developing rules of court and practice directions;
- Remedying breaches of the rules of natural justice and setting aside default orders;
- The power to correct, vary or extend an order to prevent injustice;
- The power to order that a case be heard in camera;
- The power to prohibit the publication of part of proceedings;
- The power to decline to proceed with a matter if the proceedings are not properly constituted;
- The power to dismiss an action for want of prosecution, including cases where a prolonged or inordinate delay means that the defendant is likely to suffer prejudice;
- The power to compel observance of the court's process and obedience of and compliance with its orders;
- The power to punish for contempt of court, including any conduct calculated to interfere with the due administration of justice;
- The power to exercise protective and coercive powers over certain classes of person (i.e. parens patria, control over practitioners and officers of the Court);
- The right to inspect documents denied to one of the parties.

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[20] Keith Mason, 'The Inherent Jurisdiction of the Court' (1983) 57 ***Queensland Law Journal*** 449.

[21] Wendy Lacey, 'Inherent Jurisdiction, Judicial Power and Implied Guarantees Under Chapter III of the *Constitution*' (2003) *Federal Law Review*, http://www.austlii.edu.au/au/journals/FedLRev/2003/2.html, pp. 1-32 (accessed 31 January 2008).

(2) Preventing steps from being taken that would render judicial proceedings inefficacious:

- The power to order security for costs in civil actions;
- The power to stay the execution of a judgment;
- The power to grant certain remedies including Anton Pillar Orders and Mareva Injunctions.

(3) Preventing abuse of process:

- The power to stay or dismiss proceedings where an action is frivolous, vexatious, oppressive, or groundless;
- The power to stay proceedings where a more suitable alternative forum is available or has already been invoked;
- The power to stay proceedings where a criminal charge is pending.
- The power to stay proceedings for want of prosecution.
- The power to order a stay of proceedings, whether permanent or temporary, whether conditional or unconditional, and where such order is demanded by the circumstances of the case in order to prevent injustice.

(4) Acting in aid of superior courts and in aid or control of inferior courts and tribunals:

- The power to order a stay of proceedings pending an appeal to a superior court.

5.11 As ***Halsbury's Laws of England*** provides:

> In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of due process of law, to prevent vexation or oppression, to do justice between the parties and to secure a fair trial between them.[22]

5.12 I note that the categories of 'stay' refer to 'proceedings'. However, the authorities on 'stay' and 'injunctions' vis-à-vis decisions made by Ministers and public authorities have utilised (or denied the right to utilise) 'stay' by application of the principles applying to 'stay' vis-à-vis proceedings.

5.13 In ***Ex parte Nabuka*** the Court noted that Counsel 'confined their arguments to the power of the Court to grant a stay of the implementation of a decision already taken as opposed to a stay of pending proceedings'. Counsel for the Applicant relied on ***R. v. Secretary of State for Education and Science; Ex parte Avon County Council*** [1991] 1 All ER 282 'for the proposition that a say could be granted', whilst Counsel for the Respondents relied on ***Minister of Foreign Affairs Trade and Industry v. Vehicles and Supplies Limited*** [1991] 4 All ER 65 'for the proposition that there was no scope for staying an executive decision already taken':[23]

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[22] ***Halsbury's Laws of England***, 4th edn, Butterworths, London, England; also Isaac H. Jacob, 'The Inherent Jurisdiction of the Court' (1070) 23 ***Current Legal Problems*** 23, 51.

[23] Here, I note the reference to a decision 'already taken'. In the present case, a decision has 'already been taken' however the circumstances are that the Respondents acquiesced in the Applicant's remaining at

That the views of the English Court of Appeal and the Privy Council do not appear to coincide on this point is acknowledged by all the leading texts on the subject. Which approach will be followed in Fiji has not yet, so far as I am aware, been decided. For the purposes of this decision I will however assume that this Court has power to order a stay of the implementation of an executive decision already taken and I will then consider whether in the circumstances before me it would be right for me to order the stay sought: at 2

5.14 The Court then observed that leave having been granted (by consent), 'it must be assumed that the Applicant has a good arguable case'. The question then was:

> Where ... does the balance of convenience or justice lie? In my view it lies with preserving the status quo, in other words I do not think that the Applicant should be reinstated to his former position or to a similar position pending the hearing of the action: at 2

5.15 What is observable in perusing the judgments in ***Ex parte Nabuka*** and ***Ex parte Epeli Lagiloa*** is that both cases are clearly distinguishable from the present case on their facts and implications. It therefore bears spelling out the facts and circumstances in each.

***Ex parte Nabuka* – power of Court to grant a stay recognised: stay refused**

- October 1993 Applicant charged with six (6) disciplinary offences contrary to Public Service Commission (Constitution) Regulations 1990
- Allegations - whilst employed by the Ministry as Principal of Lelean Memorial School in Nausori he 'dishonestly obtained a total of $360 remission of school fees payable on behalf of his children attending the school as pupils
- 23 March 1994, Applicant found Guilty of offences with which charged and disciplined, downgraded three levels from TE01 to TE04, find $400
- 12 July 1994 stay sought vis-à-vis (a) procedures consequent upon the finding of guilt; and (b) decision to downgrade and fine the Applicant
- Affidavit in support wherein the Applicant 'describes the admittedly false applications for remission as a "very minor issue" and a "very simple administrative error"' as well as 'outlin[ing] the financial and psychological hardships which the demotion have caused [the Applicant] and his family'
- Permanent Secretary for Education (2nd Respondent) says were a stay to be granted 'Respondents would have great difficulty in finding a suitable placement for the Applicant and there would be no guarantee that he would be acceptable to the schools to which he might be appointed'
- Permanent Secretary says a stay 'would adversely affect the proper administration of education and the student population now midway through their academic year', pointing out that should the Applicant 'succeed in due course in his action then the salary lost by him will be recovered': at 1-2

The Court sums up:

Rishikul where she remains. The Court made and continued an Order in respect of her position. This was done for the sake of completeness and with no objection from the Respondents. On this Order, see later.

I accept that the Applicant and his family have suffered some distress as a result of what has occurred but such distress and embarrassment were always bound to follow the discovery that the Applicant had, as he has not denied, made dishonest claims for remission of fees. In my opinion the objections raised by the [Permanent Secretary] to the granting of a stay, already referred to above, have considerable force and are well taken. Furthermore, there is no reason why the action proper should not be heard and disposed of within the next few weeks. If the Applicant is successful then presumably he will be reinstated. On the other hand, should the Applicant fail then presumably he would have to be removed again after I had ordered his temporary instatement. I do not think such chopping and changing is conducive to good educational administration: at 2

***Ex parte Epeli Lagiloa* – power of Court to grant a stay denied: stay refused**

- 29 November 1993 Applicant found guilty of misappropriation of $10,000
- Applicant, holding post as Acting Vice Principal in the Civil Service at Lautoka Teachers College, charged with disciplinary offences under the Public Service Commission (Constitution) Regulations 1990 for offences in breach of Regulations – charge: 'he betrayed the trust placed in him by the Dawasamu Old Scholars Association and converted to his personal use the Association's money the sum of $10,000 placed in his custody
- 29 June 1994 Applicant's position as Acting Vice Principal in the Civil Service at Lautoka Teachers College terminated
- 22 July 1994 ex parte Summons seeking an Order that Public Service Commission and Permanent Secretary for Education be restrained by injunction from effecting the Applicant's termination
- Court determines that the application is for stay rather than injunction: at 238, 240
- Affidavit in support states Applicant:
    - summarily dismissed without considering the truth or falsity of the allegations against him and without fully complying with Regulation 41 of the Public Service Commission (Constitution) Regulations 1990
    - intends to apply to Court to have the default judgment set aside and annexes undated Affidavit sworn by 'certain representatives of the Dawasamu Old Scholars Association' re the alleged funds 'who in a nutshell state ... they are not aware of the applicant owing the alleged debt of $10,000 and misappropriating the same for his own use': at 238

- Counsel for Applicant 'relies heavily' on ***R. v. State for Education and Science; Ex parte Avon Country Council*** [1991] 1 All ER 282 and ***State v. Secretary, Public Service Commission and Permanent Secretary for Education; Ex pate Joeli Nabuka***

- Counsel for the Respondents says 'if a stay is granted it would amount to a mandatory injunction and will have the effect of "compelling the continuation of contractual relationship prior to termination"'. He says 'there was an employer and employee relationship and a decision had been taken by the Respondents': at 239

5.16 What of the facts here for Ms Nair and the Ministry? According to the material before the Court, Ms Nair has no blemish on her record. This is not an issue of reinstating a teacher who has been terminated for disciplinary offences, and in particularly disciplinary offences involving monies and allegations of dishonesty, with in the one case finding of guilt in a criminal court. Further, there has been little delay in the bringing by Ms Nair of this application. The school year

commenced for teachers on 21 January 2008, and for students on 22 January 2008. Ms Nair returned to Rishikul on 21 January. Since 21 January 2008 Ms Nair has remained at Rishikul.

5.17 On 1 February 2008 when the matter first came before me, concern was raised from the Bar by Counsel for the Applicant as to her position at Rishikul and her salary – as noted on 22 January 2008 Ms Nair was informed that if she did not go to MGM her salary would be terminated. Counsel also raised the matter of 'harassment' to which he stated his instructions that Ms Nair was being subjected. No evidence was before the Court on this aspect, however, Counsel for the Respondent stated that no interference with Ms Nair at Rishikul would be engaged in and Orders were made:

1. Pending determination of the leave application, the Applicant be allowed to remain at the school without further intervention of the Respondent.

2. Liberty to apply.

5.18 Liberty to apply was included so that if any issues should arise the matter could be dealt with promptly.

5.19 On 4 February 2008 these Orders were continued.

5.20 Hence, in the present case the situation is that all involved have been on notice since 21 January 2008, the start of the school year, that action vis-à-vis Ms Nair's transfer is pending and she has remained in situ. Even before then, the Ministry was aware that Ms Nair was not acquiescent in the transfer. As outlined, she wrote on 3 December 2007 in response to the Ministry's letter of 29 November 2007: Affidavit filed 24 January 2008, paras 4, 6 It appears that on 11 January 2008 Ms Nair approached the Minister (through the Acting DSPS, J. Buwawa) 'to lodge another verbal appeal against her transfer to MGM High School, as outlined in her notification of transfer': Affidavit Annexure 'SN 5' Not having heard from the Ministry, on 18 January 2008 she instructed her Solicitors and on that date her Solicitors wrote to the Permanent Secretary 'advising that [she] would remain at Rishikul until the Ministry responded accordingly to [her] queries': Affidavit para 9

5.21 Would damages be an adequate remedy? On all the material before the Court, and taking into account all appropriate matters as to the question, I consider it is not a case where damages constitute an adequate remedy. I observe further that in the field of discrimination[24] and victimisation the general principle that the party complaining of the conduct should not be moved from her/his position in consequence of having complained.[25] One of the problems arising in a case such as this is that moving the claimant implies it is the claimant 'at fault' or that the claimant 'has something (negative in her/his conduct) to answer for'. The principle appears to be based upon the notion that it is inappropriate in such circumstances to 'send a message' that those

[24] The contentions of the Applicant as to 'bias' by reason of her having 'spoken out' may in some views be characterised in this way in accordance with the Constitutional provisions earlier referred to. This would of course be a matter for submissions should the matter be pursued.

[25] See for example Master Builders Australia, ***Guidance Note – Grievance Procedure***, August 2007, www.masterbuilders.com.au/pdfs/GuidanceNote/Guidance%20Note%20-%20Grievance%20procedure.pdf (accessed 11 February 2008) where reference is made to transfer of the respondent. A problem with moving the claimant is that this can qualify in itself as 'victimisation' as a detriment hence (amongst other matters) the general recognition. The matter was canvassed in the course of the hearing in ***Gray v. State of Victoria (Department of Education) and Anor*** [2000] VCAT 1281 (30 June 2000).

who complain will meet with a detriment, and that this is not only a matter of their own wellbeing (if their complaint is properly founded – a matter which has not been and is not able to be determined upon at this stage, in these proceedings) but of good administration. It has consequences beyond the individual to administration and management as a whole.

5.22 No evidence is before the Court from the Respondents. No determination on the facts can be made. No determination is made. In passing I observe, however, Ms Nair's Solicitor's letter of 18 January 2008 to the Ministry which says amongst other matters:

> According to Ms Nair she was confirmed as Vice Principal in 2007 after acting for seven years in such a position at Rishikul Secondary and verily believes that she should be given time to perform there on such post before any decision is made to transfer her: Affidavit filed 24 January 2008, Annexure 'SN 3', p. 2

5.23 As to the balance of convenience, it appears that the Ministry has been able to accommodate the position at MGM at least for the time being. The question arises, however, as to how the Ministry might manage the situation were a stay to be granted so that Ms Nair resumes her fulltime duties at Rishikul as Vice Principal. Ms Nair is there, ready and waiting to take up those duties once again. What of the teacher who has been transferred into her position? The Court is not unmindful of his/her circumstances and the situation facing him/her. The Ministry will be obliged to handle this aspect in accordance with good management practice.

5.24 Subject to paragraph 5.26 below, on the papers before the Court the Ministry could have dealt with the matter promptly to obviate this need by providing the response Ms Nair sought. Ms Nair's Solicitor's letter of 18 January 2008 to the Ministry earlier referred to states:

> We have also been instructed to advise that Mrs Nair intends to start the new school year at Rishikul until the Ministry has responded accordingly to her queries: Affidavit filed 24 January 2008, Annexure 'SN 3', p. 2

5.25 Similarly in her Affidavit, Ms Nair says:

> The First Respondent never responded in writing to my letter dated the 3rd of December 2007 and I instructed my Solicitors to write to her on the 18th of January 2008 advising that I would remain at Rishikul until the Ministry responded accordingly to my queries: Affidavit para 9

5.26 It is mere speculation as to what would have occurred had the Ministry responded according to Ms Nair's request on 3 December 2007 or per her Solicitor's letter of 18 January 2007. As for the present circumstance, it may be that the Ministry took the view that with this proceeding having commenced, its position would or could be compromised by providing Ms Nair with a response to her queries. Would such an approach give support to Counsel's submissions that Regulation 13 having been followed (as it is asserted) originally, it applies so that effectively the Ministry is estopped from saying it does not? It may be questioned whether this further step would do so, in light of the step already having been taken by the letter of 29 November 2007 asking for Ms Nair's response within 28 days. However, this is a matter for the Respondents and if for this reason a considered decision has been made not to take up Ms Nair's invitation, in light of there being no material before me I do not rely upon it.

5.27 Putting the above paragraphs to one side (5.24 and 5.25), taking all the aforesaid matters into account, and without detracting from the personal situation of that teacher and the position in

which it places him/her. ultimately this is a matter for the Ministry to manage. There is at least one possibility open and that is the post at MGM.

5.28 In my opinion, accepting that the authorities are not ad idem on the matter, in all the circumstances it is my view that this is an appropriate case for a stay. I consider that this Court retains the discretion to grant a stay in such a proceeding, involving such parties, where all the circumstances of the case warrant it, taking into account whether there is a serious matter to be tried, damages are not an adequate remedy, and the balance of convenience.

5.29 In granting a stay, however, the Court would seek to ensure that the application for judicial review is heard in a timely manner, without delay on the part of either party. Hence, it is my view that a timetable should be drawn up immediately upon delivery of this judgment or within an extremely short time thereafter, with tight timelines to which the parties are required to, and do, adhere.

Orders

1. Leave granted to apply for judicial review pursuant to Order 53, Rule 3(2) of the High Court Rules 1988.
2. Stay granted of the decision of the Permanent Secretary for Education made 29 November 2007 pending final determination of judicial review application.
3. Costs in the cause.

Jocelyne A. Scutt
Judge
Suva
1st February 2008