**IN THE HIGH COURT OF FIJI**
**AT SUVA**
**CIVIL JURISDICTION**

**Civil Action No: 131 of 2012.**

**BETWEEN**: **MOHAMMED TALIB KHAN** of 7 Epeli Street, Suva, Unemployed.

**PLAINTIFF**

**AND**: **THE COMMISSIONER OF POLICE** of Fiji Police Force Headquarters, Laucala Beach Estate, Suva.

**1ST DEFENDANT**

**AND**: **THE ATTORNEY GENERAL OF FIJI** of Suvavou House, Suva.

**2ND DEFENDANT**

**BEFORE : Justice Deepthi Amaratunga**

**COUNSEL : Mr. J. M. Rabuku** for the Plaintiff
**Ms. S. Ali** for the Defendants

**Date of Hearing : 13th May, 2013**
**Date of Decision : 4th June, 2013**

# DECISION

## A. INTRODUCTION

1. The Plaintiff who was a police officer was dismissed from the Fiji Police Force in terms of Section 21(8) (b) of State Services Decree, (2009) allegedly on 30th June, 2009. The writ of summons seeking reinstatement and compensation and damages was filed on 19th May, 2012. The 2nd Defendant filed the summons on 4th February, 2013 seeking strike out of the action in terms of Order 18 rule 18(1) (d) namely, as an abuse of process.

**B. ANALYSIS**

2. The Plaintiff was a Police officer and he was dismissed from the services after an inquiry. The Plaintiff in his statement of claim at paragraph 8 states that he was never granted a fair hearing by the Tribunal that inquired in to charges against him. The particulars of unfairness have been described. The particulars of the said unfair dismissal contained in paragraph 33 and 34 of the statement of claim. The prayer of the statement of claim seeks immediate reinstatement of the Plaintiff with compensation and damages, but fails to seek nullification of the said determination of the tribunal.

3. The Plaintiff states that he was dismissed from the services upon a letter dated 30th June, 2009. Though the date of the letter was not admitted by the Defendant, the Plaintiff never received his salary since this date and he was aware of the consequence of the termination, but did not sought any legal remedy to quash the decision to terminate him from the Fiji Police Force or to quash the determination of the Tribunal that allegedly found him guilty of misconduct as charged in the charge sheet.

4. The issue is whether the Plaintiff can seek reliefs that are sought in the statement of claim and if not it can be considered as an abuse of process. The prayers in the statement of claim are as follows

> 'a. An order for immediate reinstatement to the Fiji Police Force in the position of Inspector.
> b. Compensatory (Specific) damages for loss of earnings.
> c. Compensatory (specific) damages for loss of promotion, loss of long service leave and annual leave.
> d. Compensatory (general) damages for mental distress, anxiety and suffering.
> e. Interest on the award of damages.
> f. Costs on an indemnity basis.
> g. Interest on the award of costs.
> h. Further or other relief(s) that the ……'

5. The prayer (a) which is the main relief seeks an order to reinstate the Plaintiff in the Fiji Police Force, and rest of the prayers sought damages for loss of earnings and for loss of promotion. The Plaintiff was removed in pursuant to a decision taken by the Commissioner of Police in terms of Section 21(8) (b) of the State Services Decree of 2009 (gazetted on 14th April, 2009). Section 21 (8) of the State Services Decree 2009 states as follows

> '(8) Notwithstanding anything to the contrary in any written law, the Commissioner of Police has the following powers in relation to the Fiji Police Force for all ranks and members of the Fiji Police Force:
>
> (a) To make appointments in the Fiji Police Force.
> (b) To remove officers in the Fiji Police Force.
> (c) To take disciplinary action in the Fiji Police Force
>
> **An all written law governing Fiji Police Force shall be construed accordingly**. (emphasis added)

6. The Section 21 (8) overrides the all written laws and any construction of the said law relating to issues contained in Section 21(8) has to be construed in accordance with the said Section 21(8) of the State Services Decree 2009(Decree No 6). The decision to dismiss the Plaintiff was taken in pursuant to the Section 21(8) of State Services Decree 2009 (Decree No 6), by the Commissioner of Police and this was stated in the paragraph 10 of the statement of defence.

7. The writ of summons filed by the Plaintiff seeks to reinstate the Plaintiff, by an order of court, without seeking nullification of the said determination of the Police Commissioner. This writ of summons is clearly misconceived as it neither seeks to nullify the decision of the Police Commissioner nor seeks any declaration to that effect and as long as the said determination of the Police Commissioner made in pursuant to Section 21(8) of State Services Decree 2009(Decree No 6) is in force the court cannot grant a reinstate of the Plaintiff and without reinstatement of the Plaintiff all other reliefs sought in the prayer has to be rejected as they are contingent on prayer (a). So, the Pleadings in the

present form would not need any further deliberations and should be struck off in its entirely as an abuse of process. But considering the consequences of striking out which is the last resort, I need to consider any amendment to the Pleadings would rectify the errors and save the writ of summons being struck off. One method I can think about is a declaratory remedy, but this again is not without its own checks and balances as it relates to determination relating to a public authority.

8. In **O'Reilly v Mackman** (1983) 2 A.C. 237 it was decided that declaratory remedy against a decision of a public body or person is no longer an option available considering the development of rules of procedure in relation to the judicial review and Lord Diplock held in page 285 paragraph(D)

> "Now that those disadvantages to applicants have been removed and all the remedies for the infringement of rights protected by public law can be obtained upon an application for judicial review, as can also remedies for infringements of rights under private law if such infringements should also be involved, it would in my view as a general rule to be contrary to public policy and as such and abuse of the process of the court, to permit a person seeking to establish that a decision of a public law to proceed by way of an ordinary action and by this means to evade the provisions of Order 53 for the protection of such authorities.'

9. In Goundar v Colonial Fiji [2003] FJHC 284; HBC0298.2002s (30 May 2003) Justice Pathik who decided the issue of availability of action based on writ of summons where judicial review is the obvious remedy and stated as follows

> 'I agree with Mr. Nagin's submission that the decision of the Permanent Arbitrator can only be challenged by way of Judicial Review and not by way of writ of summons as the plaintiff has done in this case.

The Arbitrator in this case was performing a **public duty**. To challenge the decision of the Arbitrator the plaintiff should have proceeded by way of judicial review. The plaintiff's Union took up her case for the sole purpose of ascertaining whether her dismissal by her employer was fair and reasonable or not.

The very issue before the Court was dealt with by me in **Joeli Naitei and 1. The Public Service Commission 2.The Attorney-General of Fiji** (Civil Action No. 256 of 2000 – judgment 7.8.01). In determining the issue I shall adopt the same reasoning as in that case and for ease of reference and for completeness I set out the same authorities at the risk of being lengthy.

Here the plaintiff is seeking to enforce a public right on the performance by the Arbitrator of a public duty. Hence the decision is susceptible to judicial review. It is different if there is a contract between the aggrieved person and the public body, and in this regard it is worth noting the following passage from the book **The Applicant's Guide to Judicial Review** by **Lee Bridges and Others** at p.5:

***"However, if there is a contract between the aggrieved person and the public body then it is likely that any actions or decisions the body makes in relation to that person be governed by private law rather than public law. The individual will not therefore be able to challenge them by judicial review: his or her remedy will be to sue for damages (and/or a declaration or injunction) in an ordinary civil court or tribunal".*** (emphasis added)

In this case there is no contract between the plaintiff and the defendant and hence no question of private law arises. The **"question will depend to an extent on the kind of body to be challenged and more so on the functions**

**they are exercising in the particular case"** (**Bridges**, ibid at p6).

The following extract from the judgment in **O'Reilly v Mackman** (1983) 2 A.C. 237 is pertinent:

**"*That since all the remedies for the infringement of rights protected by public law could be obtained on an application for judicial review, as a general rule it would be contrary to public policy and an abuse of the process of the court for a plaintiff complaining of a pubic authority's infringement of his public law rights to seek redress by ordinary action and that, accordingly, since in each case the only claim made by the plaintiff was for a declaration that the board of visitors' adjudication against the plaintiff was void, it would be an abuse of the process of the court to allow the actions to proceed and thereby avoid the protection afforded to statutory tribunals".***

Under **Order 53** where the plaintiff wrongfully brings his claim by way of judicial review, the court has power to order that that claim be continued as though it had been commenced by writ. But where the claim is wrongly commenced by writ or originating summons as in this case, the Court has no power to convert it into a claim for judicial review. As stated by **Henry J** in **Doyle and Others v Northumbria Probation Committee** (1991) 1 W.L.R. 1340 at 1344:

"And if the plaintiffs were now to bring a free-standing application for judicial review, their delay has been such that I would find it difficult to envisage the court granting leave to them to apply for such judicial review. Therefore it seems to me that if the defendant committee succeeds in the application that it is making, that will be end of the plaintiffs' claim."

I have considered the legal arguments put forward by the learned counsel for the plaintiff. She has raised certain points. The main hurdle that the plaintiff has to get over is whether the writ of summons is the correct mode of proceeding with her grievance. As I have said, for the above reasons, the plaintiff has adopted the wrong mode, in other words she should have proceeded by way of judicial review. There is abundance of authority on the subject and I have dealt with it at length in **Ram Prasad s/o Ram Rattan and the Attorney-General of Fiji** (Civil Action No. 311/92) which was upheld by the Court of Appeal which also dealt with the issues at some length. [**Ram Prasad f/n Ram Rattan v The Attorney-General of Fiji**, Civil Appeal No.ABU0058 of 1997S – Judgment 27.8.99].

Having decided that this was not the correct mode, I conclude with the following passage from the judgment in **Moroccan Workers Association v Attorney-General** (1995) **1 Law Reports** of the Commonwealth 451 (SC) vide Commonwealth Law Bulletin July 1995 p747 –749.

"**Matters of public law and administration ordinarily fell within the purview of s.31 of the Supreme Court Act 1981 and RSC Ord 53. The remedies therein provided that judicial review ought to be the normal recourse in all cases where allegations were made that rights under public law were being infringed, e.g. where a private person was challenging the conduct of a public authority or a public body, or of anyone acting in the exercise of a public duty**. The institution of proceedings by originating notice of motion for purely declaratory relief without any explanation of the delay that occurred before their institution in February 1993 and which were brought for the purpose of challenging matters of public law and administration was an inappropriate procedure and an abuse of the process of court."

In this case judicial review was the procedure under Order 53 of The High Court Rules. The ratio of **O'Reilly** as found in **Lord Diplock's** speech at p.285 was extended to **Cocks v Thanet District Council** (1983) 2 A.C. 286. There the action was commenced by writ and **"it was stopped in that course, in that it was struck out as an abuse of the process of the Court in the House of Lords"**.

In the outcome in the light of the many authorities on the issue before me and in view of the decision that I have reached as to the form the proceedings should take in matters of the nature before the Court I will allow the procedural objection raised by the defendant.

Before departing from this subject of distinction between private law and public law, it is accepted that **Ram Prasad**, a decision of the Court of Appeal, is authority for the decision in this case. A number of other cases in the High Court have been struck out for the reasons stated in Ram Prasad. Some of the cases are:

**Jimione Buwawa v The Permanent Secretary for Education and Others** (Suva High Court Judicial Review No.HBJ0019 of 1997, 22 July 1997, **Pathik J**) – dismissing an originating summons; **Fiji Public Service Association v Civil Aviation Authority of Fiji & Others**, (Lautoka High Court Judicial Review No.HBJ0015 of 1998 – 30 November 1998 – **Madraiwiwi J**); **Eroni Waqaitanoa v The Commissioner of Prisons & Others**, (Suva High Court Civil Action No.HBC0271 of 2000 – 7.9.2000 – **Scott J**); **Shakuntala Nair v The Secretary, Public Service Commission & Another**.(Suva High Court Civil Action No.HBC0359 of 2000 – 28.5.2001 – **Scott J**). For completeness I would mention that **Bryne J** was inclined towards a different view from his brother Judges in the **Fiji Teachers Union v The Permanent Secretary for**

**Education & Another** (Suva High Court Civil Action No. HBC0021 of 1997, 21.7.98) after referring to an extract from **Administrative Law** by **Wade and Forsyth** and relying on **Doyle** (supra) and **British Steel plc.v Customs and Excise Commissioners** (1997) 2 All E.R. 366. However, His Lordship's decision predates Ram Prasad.

**For these reasons I declare that the plaintiff is not entitled to continue with his Writ of Summons or seek the relief sought by her otherwise than by application for judicial review** if she is still able to do so under Order 53 of The High Court Rules. It is for her counsel to decide what course the plaintiff should take to pursue her grievance.'

10. In Digicel Fiji Ltd v Pacific Connex Investments Ltd [2009] FJCA 64; ABU0049.2008S (8 April 2009) the Court of Appeal of Fiji again dealt the same issue extensively and discussed the application of law in relation to the issue in Britain and Australia and finally held,

'41 In our view, if one asks the question how these proceedings would have measured up to their requirements for judicial review one clear point stands out. **These were public law issues. It may be the claim for damages is based on tort (as originally contended by Pacific Connex) or to equity as contended for in this Court**. However, on any view the root of the claim is in public law. The consequence of this, on the authorities is that the **proceedings should have been brought by judicial review**. To bring them via Originating Summons was an abuse of the process of the court. We have not lost sight of the fact that this may lead to the Plaintiff being deprived of its remedy simply because it chose the wrong procedural route. It is not open to amend the proceedings to convert such proceedings to a judicial review. The only real course open to the Plaintiff would appear to be to now apply for judicial review out of time and pray in aid the wrong choice

of proceedings as a possible basis for motivating the High Court to permit the proceedings to proceed notwithstanding the time issue. (emphasis added)

11. At the oral hearing of the summons to strike out, the counsel for the Plaintiff stated that he resorted to action based on writ of summons since as he was out of time for a judicial review application. When I inquired from him whether this can be done in order to circumvent the lapse of time if proceeded by way of judicial review application the counsel stated that it was a trite law and I requested any case law on that issue but he failed to submit any on the point. I disagree with the contention of the Plaintiff's counsel. The requirement of filing a judicial review with in the limited time period as stipulated in Order 53 was made with a purpose and if any extension has to be supported with reasons and the discretion of the court is exercised in such instance to abridge the time period. These mechanisms are not available in writ of summons and if allowed the time period can be anything between 3 to 6 years depending on the nature of the alleged tort. The fixation of limited time to question any determination of public body or person is done with efficiency of the administration in mind. This is the rationale in seeking leave of the court for any abridgment if needed and the discretion of the court for that is needed at the inception and this process cannot be circumvented by adopting to file a writ of summons; The action of the plaintiff is an abuse of process and needs to be struck off considering the clear principles laid down in Fiji Court of Appeal in Digicel Fiji Ltd v Pacific Connex Investments Ltd [2009] FJCA 64; ABU0049.2008S (8 April 2009)

## C. CONCLUSION

12. The writ of summons in its present form is hopeless and needs to be struck off. Even considering any amendment to it the Plaintiff would not succeed as the remedy is clearly within the realms of public law. The safeguards against the decisions of public authority are enshrined with a purpose and this is to eliminate any uncertainty of their determinations and to circumvent such provisions without a valid reason is not warranted and also against he public policy. The provisions contained in Section 21(8) of State Service Decree 2009 which overrides all the written laws needs to be construed in accordance with

the purpose of the State Services Decree 2009 and the action is struck off and the cost is summarily assessed at $1000.

## D. FINAL ORDERS

a. The Plaintiff's action is struck off

b. The cost is assessed summarily at $1,000 (for 2nd Defendant).

Dated at **Suva** this **4th** day of **June, 2013**

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**Justice Deepthi Amaratunga**

**High Court, Suva**