

IN THE HIGH COURT OF FIJI  
AT SUVA  
CIVIL JURISDICTION

CASE NUMBER: HBJ 11 OF 2012

BETWEEN: THE STATE

AND: THE PUBLIC SERVICE COMMISSION  
RESPONDENT

EX-PARTE: FIJI PUBLIC SERVICE ASSOCIATION  
APPLICANT

Appearances: *Mr D. Nair for the Applicant.*

*Mr. R. Green for the Respondent.*

Date/Place of Judgment: *Friday 07 March 2014 at Suva.*

Coram: *The Hon. Justice Anjala Wati.*

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**JUDGMENT**

Catchwords:

*Judicial Review- seeking leave to issue judicial review against decision of PSC in imposition of retirement age on public service employees-does the Court have jurisdiction to hear the case- is there an arguable case- delay in bringing proceedings- right of trade union to appear in Civil High Court without the services of a barrister and solicitor.*

Cases:

*Public Service Commission and Attorney General of Fiji v. Fijian Teachers Association and Public Service Association [unreported] Civil Appeal ABU 0003 of 2007.*

**Legislation:**

*Administration of Justice Decree 2009 (Decree No. 9) ("AJD"): s. 5(4), (6); 23.*

*High Court Rules 1988 ("HCR"): Order 5 Rule 6(2).*

*Public Service (Amendment) Decree 2011 (Decree No. 36 of 2011) ("PSAD"): ss. 10B, 10C, 10E, 10L.*

*State Services Decree No. 6 of 2009 ("SSD"): s. 15.*

*The Constitution of the Republic of Fiji Islands.*

*The Employment Relations Promulgation 2007 ("ERP"): s. 229; 144.*

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***The Cause***

- [1]. The applicant seeks leave to apply for judicial review against the decision of the Public Service Commission ("*PSC*") in imposing the retirement age on its employees.
- [2]. The applicant says that the actions of the PSC in imposing the retirement age of 55 years is contrary to ss.10C and 10E (d) of the PSAD.
- [3]. The applicant therefore seeks the following orders:
  - a. *A declaration that ss. 10C and 10E (d) of the PSAD is lawful and does not impose any retirement age on the employees; and*
  - b. *an order for mandamus to require the PSC to comply with ss. 10C and 10 E (d) of PSAD and for PSC to desist from discriminating employees by imposing the retirement age of 55 years.*

***The Grounds for Leave***

- [4]. The applicant states that the SSD was promulgated on 14 April 2009. By that Decree the retirement age in the Public Service reduced from 60 to 55 years. Many of the employees had to retire due to the imposition of 55 years as retirement age.

- [5]. On 29 July 2011 the PSAD was promulgated. Ss. 10C and 10 E (d) of the PSAD effectively protects the employees in the Public Service from any form of discrimination which includes the imposition of any retirement age. Ss. 10C and 10E (d) of the PSAD overrides any retirement age provision in the SSD.
- [6]. The imposition of the retirement age is thus unlawful.

***The Grounds in Opposition***

- [7]. The application for leave is objected principally on four grounds. The first is that s.5 (4) of the AJD clearly provides that no Court shall have jurisdiction to accept, hear and determine or in any other way entertain any challenges whatsoever (including any application for judicial review) by any person to the validity or legality of any Decrees made by the President from 10 April 2009 and any other Decrees as may be made by the President. The existence of this provision of s. 5(4) now requires the Court to transfer the application for leave for termination by the Chief Registrar as the Court does not have any jurisdiction to hear the application for leave.
- [8]. The second ground of opposition is that the issue of imposition of retirement age of 55 years on the employees of the PSC has already been adjudicated by Court of Appeal of Fiji in the case of *Public Service Commission and Attorney General of Fiji v. Fijian Teachers Association and Public Service Association [unreported] Civil Appeal ABU 0003 of 2007*. The Court of Appeal had upheld the reduction of the retirement age from 60 years to 55 years. The applicant's act of seeking to re-litigate the issues is an abuse of the process of the Court.
- [9]. The third ground of opposition is that the applicant has misconstrued the provisions of the PSAD. S. 10 L (4) expressly allows for the imposition of a retirement age in the Public Service. As such there is no arguable case for the applicant.
- [10]. Finally, the respondent says that the application is out of time in that the PSAD was promulgated in July 2011. The issue is raised after a span of more than one year. On the grounds of delay, the proceedings should be struck out.

***Applicants Submissions***

- [11]. On the issue of jurisdiction, the applicant argued that the judicial review application does not intend to challenge any Decree but is seeking compliance of ss. 10C and 10 E (d) of the PSAD. The High Court of Fiji was established under s. 2c of the AJD. S. 6 of the Decree provides for the jurisdiction of the High Court to have unlimited original jurisdiction to hear and determine any Civil or Criminal proceeding, to hear appeals from all judgments of subordinate Court and to supervise any Civil or Criminal proceedings before a subordinate Court. Order 53 of the HCR provides the High Court with powers to hear applications for judicial review. As such the Court has jurisdiction to hear this matter.
- [12]. On the issue of *res judicata*, the applicant argued that the matter decided by the High Court was before the enactment of the PSAD and as such the highlighted provisions of ss. 10C and 10 E (d) was never determined by the Court.
- [13]. S.10L of the PSAD allows for imposition of a retirement age but it does not expressly state what should be the retirement age. This section 10L is contrary to ss.10 C and 10E (d) of the same Decree and requires interpretation of law.
- [14]. There is no limit to file an application for mandamus thus there is no question of delay and being out of time.

***Respondents Submissions***

- [15]. The respondent argued that s.15 of the SSD prescribes a retirement age in Public Service. The crux of the leave application is to challenge the imposition of the retirement age prescribed by s.15 of the SSD. The Courts power to entertain the challenge to s.15 of the SSD is ousted by s.5 (4) of the AJD.
- [16]. S.3 of the Constitution Amendment Act 1997 Revocation Decree 2009 ("**CARD**") declares that all Decrees promulgated shall be regarded as law and shall be observed and enforced. The SSD thus must be regarded as law, observed and enforced. The application is a direct challenge to s.3 of the CARD.

- [17]. The applicant relies on s.10C and 10 E (d) of the PSAD. These sections are subject to limitations. Moreover, these ss. of 10 C and 10 E (d) does not limit the powers of public service in imposition of a mandatory retirement age as provided for by S.10L (4) of the PSAD.
- [18]. Alternatively, the respondent argues that a trade union is a body corporate and must bring a suit through a barrister and solicitor as provided for by order 5 Rule 6 (2) of the HCR . S.144 of the ERP states that registration of a trade union renders it a body corporate. It was argued that Mr. Nair could not have brought this application on behalf of the applicant and could not have presented the case on its behalf.
- [19]. The respondent stated that in the case of *Fiji Public Service Commission (Supra)* the Court of Appeal had upheld the retirement age. On appeal the Supreme Court had decided on 1 April 2009 to stay the decision of the Court of Appeal. The commencement of the SSD effectively terminated the matter. A certificate of termination should have been issued under the provisions of s. 23 of the AJD. The applicant's cause of action has previously been put to rest.
- [20]. The respondent reiterated that the applicant slept on its right for over a year. It is an abuse of process to allow such time to lapse then apply for leave. It would be impossible for the PSC to reinstate the employees who had retired at the age of 55 pursuant to the mandatory imposition of the retirement age. Any order to set aside the decision of the PSC in imposing the mandatory retirement age would be detrimental to its good administration practices.

### ***The Law and Analysis***

- [21]. The nature of the opposition in the application requires me to categorise my findings in four various heads: *the jurisdiction, res-judicata, undue delay, and the arguable case*. I will finally address the issue of the right of the Union to bring an action without the services of a qualified lawyer.
- [22]. Firstly, the issue of Jurisdiction. The applicant is mainly and effectively challenging the decision of the PSC in imposing a compulsory retirement age of 55 years on its employees. The PSC acquires its powers to impose the retirement age by s.15 of the

SSD. The challenge to the imposition of the retirement ages is thus a challenge to the provision of the SSD. The challenge tantamounts to a challenge to the validity of the provision of the Decree and /or the Decree in a whole and as such prohibited by s.5 (4) of the AJD.

[23]. S. 5(4) reads:-

*“Notwithstanding anything in this Decree or anything contained in this Decree or any other law, no Court shall have the jurisdiction to accept, hear and determine, or in any other way entertain, any challenges whatsoever (including any application for judicial review) by any person to the validity or legality of any Decrees made by the President from 10 April 2009 and any Decrees as may be made by the President”.*

[24]. S. 5 (6) of the AJD requires me to send this matter to the Chief Registrar for a termination certificate to be issued. I shall deal with this aspect later.

[25]. The application says that it is seeking compliance with ss.10C and 10 E (d) of the PSAD. I will deal with this issue under the head of *arguable case*.

[26]. Is there an arguable case for leave to be granted? I will deal with this aspect as well notwithstanding my earlier finding that the Court does not have jurisdiction to entertain challenges to the validity of the provisions of a Decree made by the President from 10 April 2009.

[27]. The provisions called in question are ss.10C, 10E (d), and s.10L (4) of the PSAD. I shall outline the various sections in full. In addition I shall also cite the provision of S.10 B as S.10 L (4) makes reference to 10B too.

*“10 B (1) No person employed in the public service shall be required to perform forced labour.*

*(2) No person shall discriminate against any employee or prospective employee on the grounds of ethnicity, colour, gender, religion, national extraction, sexual orientation, age, social origin, marital status, pregnancy, family responsibilities, state of health including real or perceived HIV/AIDS status, trade union membership, or disability in respect of recruitment, training, promotion, terms and*

*conditions of employment, termination of employment or other matters arising out of the employment relationship.*

- (3) *Male and female employees shall be paid equal remuneration for work of equal value.*
- (4) *An employee is not obliged to join a trade union.*
- (5) *An employee shall not be prohibited from being or becoming a member of a trade union and it shall not be a condition of employment that an employee must not be or become a member of a trade union".*

*"10 C For the purposes of this Part, the prohibited grounds for discrimination whether direct or indirect are actual or supposed personal characteristics or circumstances, including; ethnic origin, colour, place of origin, gender, sexual orientation, birth, primary language, economic status, age, disability, HIV/AIDS status, social class, marital status (including living in a relationship in the nature of a marriage), employment status, family status, religion or belief".*

*"10 E (d) If an applicant for employment or an employee is qualified for work of any description, an employer or a person acting or purporting to act on behalf of an employer must not retire the employee, or to require or cause the employee to retire or resign, subject to any written law or employment contract imposing a retirement age, by reason of any of the prohibited grounds of discrimination set out in section 10C"*

*"10 L (1) Sections 10B and 10E do not apply in relation to a position or employment where being of a particular age or in a particular age group, is a genuine occupational qualification for that position or employment, whether for reasons of safety or for any other reason.*

(2) *Sections 10B and 10E do not prevent payment of a person at a lower rate than another person employed in the same or substantially similar circumstances where the lower rate is paid on the basis that*

*the first mentioned person has not attained a particular age, not exceeding 18 years of age.*

(3) *Sections 10B and 10E do not prevent preferential treatment based on age accorded to persons who are paid in accordance with subsection (2).*

(4) *Sections 10B and 10E do not prevent the imposition of a mandatory or voluntary retirement age in the public service”.*

[28]. The applicant says that the imposition of the compulsory retirement age is discriminatory. S10C of the PSAD is a repeat of S.10 B (2). S.10 B (2) and in other words s.10C is subject to s.10L (4). S.10 E is also subject to s.10 L (4). The words in S.10 (L) (4) which are “*sections 10B and 10E do not prevent...*” makes s. 10(L) (4) the overriding provision. One has to comply with ss.10B, 10C and 10E but these are not superior to the rights of the PSC to impose a mandatory retirement age founded in s.15 of the SSD.

[29]. There is thus nothing for the PSC to comply with under S.10B, 10C and 10E (d). There is no reason for any leave to be granted in this case.

[30]. Is the issue res-judicata by the earlier decision of the Court of Appeal? I have been asked to look at the provisions of ss.10B, 10C, 10E (d) and 10 L of the PSAD and decide whether the imposition of s15 of the SSD retirement age is discriminatory. The matter is being asked to be decided from a point of view of discrimination and with reference to a legislation which was passed after the decision of Court of Appeal. I am asked to look at some new provisions. In that regard I do not find that this case should be dismissed on the grounds of res-judicata.

[31]. The question of delay here is bothering me. The PSAD was enacted on 29 July 2011. This action was filed on 21 November 2012. The Public Service Commission has been retiring its employees at the age of 55 since the SSD came in force. If the applicant thought that the PSAD gave them any right in 2011 to enforce it, an action should have been brought immediately and not after almost 1½ years. To that end I find there is delay to prejudice good administration of retiring and employing government workers by PSC. A lot of people who have retired in the last 1 ½ years



ought to have been told of their rights sooner. Even if this action had any basis of survival, the question of delay would have definitely been a hurdle.

[32]. In a Civil Court, the FPSA does not have a right to bring an action other than through a barrister and solicitor. Order 5 Rule 6(2) of the HCR makes this prohibition.

*“Except as expressly provided by or under any enactment, a body corporate may not begin or carry on any such proceedings otherwise than by a barrister and solicitor.”*

[33]. By s.144 of the ERP, a registered trade union is a body corporate.

[34]. If the action was brought in ERC than the Civil Court, the applicant could have argued its right under s.229 of the ERP which reads:

*“ 229 (1) A party to a proceeding before the Tribunal or Court may-*

- (a) appear personally;*
- (b) be represented by a representative whom the Tribunal or the Court is satisfied has authority to act in proceedings; or*
- (c) be represented by a legal practitioner,*

*And may produce before the Tribunal or the Court witnesses, documents, books, and other evidence as the party thinks fit.*

*(2) In any proceedings, the Tribunal or the Court may, with leave of the Tribunal or the Court, allow a person who, in the opinion of the Tribunal or the Court, is entitled to be heard, to appear or to be represented.*

*(3) The Tribunal or the Court may order any person to appear or to be represented before it”.*

[35]. This action has been brought in the Civil Court and the ERP does not apply to proceedings begun in Civil Courts.

[36]. This matter cannot survive on the grounds of jurisdiction or merits. It was crystal clear from the beginning that the action had no basis of survival. As such the State is entitled to costs of the proceeding which I shall summarily assess.

[37]. The issue now is should I transfer the matter to the Chief Registrar for termination of proceedings or dismiss it. Normally, if I do not have jurisdiction to hear the matter under s. 5(4) of the AJD, I have to forward the matter to the Chief Registrar for termination of proceedings. Having said that, this matter had to be looked on its merits too as the employees are given hope that they have a right which is not being determined because of the provision of s. 5(4) of the AJD. Now that the Constitution of the Republic of Fiji Islands too has come in force, the Court will take a clear stance in pronouncing that there is no legal basis for any employee to seek to continue in employment after the compulsory retirement age of 55. This may hopefully put an end to such applications by any individual or union. On that policy reason, I have to dismiss the action on merits.

***Final Orders***

[38]. The action is dismissed. The application shall pay to the respondent cost of the proceedings in the sum of \$1500.00.

**Anjala Wati**

**Judge**

**07.03.2014**

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**To:**

1. *Mr. Nair for the Applicant.*
2. *Mr. Green for the Respondent.*
3. *File: HBJ No. 11 of 2012.*