

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

HBJ Action No. : 01 of 2014

BETWEEN : **MICHAEL WONG**
PLAINTIFF

AND : **PUBLIC SERVICE COMMISSION**
DEFENDANT

COUNSEL : Mr. V. Tuberi for the Plaintiff
Ms. L. Bali [AG's Chamber] for the Defendant

Date of Hearing : 7th April 2015

Date of Judgment : 12th May 2015

DECISION

1. The Applicant filed an application seeking leave to apply for Judicial Review, dated 14/2/14. In the said application the applicant among other things have prayed for an order of certiorari and mandamus in terms of Order 53 Rule 4 and Order 24 Rule 8 of the High Court Rules.
2. In the said application the Applicant had challenged the Decision made by the Public Service Commission on 28.9.11 in terminating his services.
3. The Respondents had filed their Notice of Opposition dated 13.3.14 and vehemently opposed the said application. Among other grounds the Respondents submitted that there was undue delay.
4. Subsequently on 19.3.2014 another summons had been filed by the Applicant for leave to be granted to file Judicial Review out of time.

5. Both parties were not at variance that the court should decide the summons filed on 19.3.14 first as it will decide the fate of the application for judicial review.
6. The said summons was fixed for hearing and both parties have filed their written submissions and made oral submissions. After considering the affidavits, oral and written submissions and the judgments cited now I proceed to make my Determination.
7. The Applicant had been a teacher who had served in several schools. While being a teacher he had meted out corporal punishment on a student. As a result of the said incident he had been charge sheeted, a disciplinary inquiry had been held and his services terminated.

Determination

8. The application is made pursuant to Order 53, Rule 4. The Respondent has vehemently objected to leave being granted. Among other objections they strenuously argued on the delay. Order 53 Rule 4 contemplates a time period of 3 months from the date of the impugned order for filing an application for Judicial Review. However the present application is more than 26 months after the impugned order.

Order 53 Rule 4

9. Order 53 Rule 4 of the High Court Rules states that,
 - (a) *Where there is delay in making an application for judicial review, the court may refuse to grant the relief sought in the application if it thinks that granting it would be likely to cause substantial hardship to, or substantially prejudice the rights of any person or would be detrimental to good administration.*
 - (b) *Where there is an application for leave to issue judicial review where the relief sought is an order for certiorari, and application is made after 3 months has expired, in such a case, the trial judge is allowed to consider whether there was a delay and whether the grant of relief is justified. The rule does not allow him to consider delay if the application was filed within the 3 months period.*
10. Both parties are not at variance pertaining to the delay in filing these applications for Judicial Review.
11. The Respondent's opposition to granting of relief was based on the following grounds:

- i. **The application of the Applicant is an abuse of process of Court.**
 - ii. **The delay in application is prejudicial to the Respondent and detrimental to good administration.**
 - iii. **Lack of reasons for delaying in applying for leave for judicial review.**
 - iv. **There is no arguable case by the Applicant to support its applications.**
 - v. **That no stay be granted of the decision by the Respondent.**
12. I find as per Order 53 Rule 4 the trial judge has to take into consideration whether there is a delay. However the Court also has to consider whether the Applicant had sufficiently and for good reasons explain the delay to obtain relief.

Delay

13. Even though under Order 53 Rule 4 the Judicial Review application should be filed within 3 months the Respondent submitted that the Applicant had waited 26 long months to file this application.

In R v Stratford on Avon DC ex parte Jackson (1985) 2 AER 769

“...we have concluded that whenever the failure to act promptly or within three months there is “undue delay”. The court therefore still retains a discretion to refuse to grant leave for the making of the application or relief sought on the substantive application on the grounds of undue delay if it considers that the granting of the relief sought would be likely to cause substantial hardship to, substantially prejudice the rights of, an person or would be detrimental to good administration...”

In Harikusun Limited v Dip Singh and the Director of Town and Country Planning and Suva City Council (1995) ABU 019 of 1995.

The Court opined “but obviously delay on the part of the Applicant will be an important one.....”

In this case the court defined undue delay as ***“Undue delay means excessive, extreme, and unjustifiable or going beyond what is appropriate. The effect upon others may well bear upon what these terms import”***.

14. As per Order 53 Rule 4 both parties were not at variance that the application should have been filed within 3 months from the impugned Order. I find the Applicant was silent on the allegation that the application had been made 26 months after the impugned order was made. In this circumstance, it is incumbent on the Applicant to give sufficient and good reasons for the delay. It is incumbent for the Applicant to explain the delay.
15. Strangely I find the Counsel for the Applicant did not make any attempt to explain the delay in his submissions. As per the affidavit in support of the second summons by the Applicant where he had sought Court to grant leave to file Judicial Review out of time, the Applicant had averred that he had been in shock, therefore he couldn't file the application for Judicial Review.
16. I do not think a mere averment in the affidavit to say that he was in shock without any supportive documents is sufficient to discharge the onus on the applicant.
17. I also find that the delay in this instance is not one year but a little more than two years.
18. I find the Applicant in his first affidavit in support of the judicial review application has failed to disclose that his application was unduly delayed. It has been pleaded subsequent to the Respondent raising it as an objection.
19. Thus he has opted not to give any explanation on delay. Once the Respondent had filed a notice of opposition, objection among other things on delay, the Applicant had filed a second summons with a supportive affidavit seeking leave to be granted to file judicial review out of time.
20. In view of the time stipulated, under Order 53 Rule 4 when the Applicant is filing an application for judicial review out of time as I have stated earlier it is incumbent on him to give sufficient good reasons to explain delay with supportive documents if any. But in this instance I find the Applicant has failed to do so. In the absence of any supportive documents or good and sufficient reasons to justify the delay. I find the unsupported unexplained 'Shock' unacceptable.
21. Even if this court is to consider that the Applicant was in 'shock' as per his own affidavit it was only for a period of 1 year. The application has been filed after more than 2 years.
22. Counsel for the Applicant has attempted in his written submission to take cover of Order 3 of the High Court rules to overcome delay. I do not think the Applicant has shown any good cause to invoke Order 3. In his attempt to invoke order 3 of the High Court rules the Applicant cited *The State v The Director of Town and Country Planning and others ex-parte Singh (1997) FJHC 208* and *State v His Excellency the President Ratu Josefa*

Iloilo Uluivuda & another ex-parte Ratu Ovini Bokini & another (2008) FJHC 120 HBJ 39,2007. I find the facts and circumstances of the said cases are different to the case before me.

23. The Applicant's counsel also declined to make any submissions on delay and submitted that issue of delay should be considered not at the leave stage but at the substantive hearing stage. In my view this issue is now settled in this jurisdiction. There is a plethora of Judgments on this issue. High Court Order 53 Rule 4 itself is clear, thus the Court has the discretion to refuse leave if there is an undue delay. As per the circumstances of this case submitted by both Counsel in my view this is not an instance for this Court to use its discretion under Order 3 Rule 4 of the High Court Rules.

Prejudice to Rights

24. Now I will consider whether granting of relief to the Applicant is prejudicial to the rights of others and detrimental to good administration.
25. The Respondent's Counsel submitted that the Applicant was in Public Service. He was a teacher and when his services were terminated the vacancy cannot be kept indefinitely as it definitely would be detrimental to good administration.
26. The Respondent submitted that a teacher to replace the Applicant had been appointed and granting the extension of time or leave would prejudice his rights, the rights of the students and the administration.
27. The Respondents cited the case of *Jiuta Waqaonovono v Public Service Commission (1999) Civil action 30/94.*
28. As quite correctly submitted the Applicant's services had been terminated and he slept over his rights for 26 months from the impugned order. An appointment in the Public Service specifically a vacancy for a teacher cannot be kept for 26 months until the Applicant wakes up from his slumber and decides to challenge the decision by Judicial Review.
29. Once a teacher's services are terminated a prudent man cannot expect the vacancy to be kept for an indefinite time. It has to be filled. It cannot be kept vacant till the terminated person thinks it's fit to challenge it. I find support in *Jiuta Waqavonovono v The Public Service Commission* (Supra) where it was held "**Applications for Judicial Review are subject to time limits and Court can refuse leave as a result of quite short periods of**

delay. If it was not so, public authorities would be saddled with dealing with unjustifiably late applications”.

30. I find the Applicant has failed to answer as to how his late application would not prejudice the rights of others and good administration. The Respondent satisfied Court that granting of leave for Judicial review out of time will be prejudicial to the others and detrimental to good administration.

Locus Standi

31. In this instance the parties did not contest the fact that the Applicant had Locus Standi.

Arguable Case

32. The Applicant submitted that at this stage the Court should not consider whether the Applicant has an arguable case or not. Counsel submitted that it should be left for the substantial hearing.
33. The Respondent replied to his argument citing *Inland Revenue Commissioner v National Federation of Self Employment and Small Businesses Ltd [1981] 1 All ER 93* and *National Farmers Union v Sugar Industry Tribunal & Others ABU 8/1990* that the Applicant at this stage should demonstrate that they have a prima facie arguable case.
34. In this context it is pertinent to note that the Applicant has not denied the fact that he had admitted his purported action. However what he was challenging was the way the disciplinary inquiry proceeded. The Applicant in his grounds for Judicial Review has stated that there is a suspicion of bias, however in my view a mere a suspicion will not be sufficient to have an arguable case.
35. Even though the applicant at this stage does not have to demonstrate actual bias, there should be sustainable grounds averred to demonstrate a reasonable suspicion.
36. In the absence of any submissions on an arguable case, the Respondent has submitted that the Applicant has even failed to demonstrate an arguable case in the supporting affidavits.
37. As submitted by the Respondent’s counsel, in the affidavits filed in opposing the application, the Respondent has clearly submitted the procedure that is adapted when a party admits the disciplinary charges. Even though the Court at this leave stage does not have to go to the merits in depth of the case, it is incumbent on the applicant to

demonstrate that he has an arguable case to obtain leave. I find this is lacking in the affidavit evidence before me.

38. The Respondents cited *State v Permanent Arbitrator ex parte FEA High Court Civil action, JR no. 0001/1997* where the Court had held;

“This necessarily implies a corresponding duty on counsel not only to draft their grounds with particularity out also, to ensure that there is some supporting affidavit evidence to enable the Court to form on the papers, a prima facie view favourable to the applicant seeking leave.”

Conclusion

39. For the reasons stated above I find the Applicant has failed to explain or give sufficient reasons to purge the delay and also has failed to demonstrate an arguable case. I find the Applicant has failed to satisfy Court with good and sufficient reasons for his delay. I also find he has failed to justify any reason why court should use its discretion to grant the relief sought.
40. Under the circumstances, I am inclined to accept the Respondent’s objection that granting of leave after the laps of 2 years from the impugned order would cost substantial hardship, and would be substantially prejudicial to the rights of others and detrimental to good governance. Accordingly I make the following orders:
- a. **The application for leave, to file judicial review out of time is refused and dismissed.**
 - b. **The Respondents are awarded a summarily assessed cost of \$850.**

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JUDGE

12.05.2015

