

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Judicial Review No. HBJ 6 of 2013

IN THE MATTER of an Application
for leave to apply for Judicial Review
by PETER LEDUA **(Applicant)**

and

IN THE MATTER of the decision
dated the 26 July, 2013
by the PUBLIC SERVICE
COMMISSION whereby it purported
to terminate the employment of the
Applicant from the Ministry of
Justices

BETWEEN : **THE STATE**

and

THE PUBLIC SERVICE COMMISSION

Respondent

AND **PETER LEDUA**

Ex-Parte
Applicant

BEFORE : **His Lordship Hon. Justice Kamal Kumar**

COUNSEL : Applicant in Person.
Ms O. Solimailagi for the Respondent

DATE OF JUDGMENT : 31 March 2016

RULING

(Application for Leave to Apply for Judicial Review)

1. INTRODUCTION

- 1.1 On 15 August 2013, the Applicant filed Application for Leave to Apply for Judicial Review of the decision of the Respondent to terminate Applicants' employment with Civil Service (pursuant to Order 53 Rule 4(2) of the High Court Rules).
- 1.2 On 19 September 2013, Respondent filed Notice of Opposition.
- 1.3 Following Affidavits were filed on behalf of the parties:-

Applicant

- i. Affidavit in Support of Applicant sworn on 14 August 2013 (**"Applicant's 1st Affidavit"**);
- ii. Affidavit in Reply of Applicant Respondents Answering Affidavits Sworn on 11 October 2013 (**"Applicant's 2nd Affidavit"**);

Respondent

Affidavit of Seruwaia Barai sworn on 19 September 2013.

- 1.4 On 26 August 2013, the Application was called before his Lordship Justice Kotigalage (as he then was) when parties were directed to file Affidavits and the Application was adjourned to 7 October 2013, for mention.
- 1.5 On 7 October 2013, the Court granted Applicant further time to file Affidavit in Reply and directed parties to file Submissions on issues raised in Notice of Opposition within fourteen (14) days and ruling was to be delivered on notice.
- 1.6 Ruling not being delivered by his Lordship Justice Kotigalage (as he then was) this matter was called before this Court on 10 September 2015 when court directed registry to serve Notice of Adjourned Hearing on the Applicant and this matter was adjourned to 2 October 2015 and then to 5 February 2016.
- 1.7 On 5 February 2016, Applicant did not appear and Counsel for the Respondent sought hearing date and informed the Court that Respondent had filed submissions

1.8 There being no Submissions on the Court file Court requested Respondent's Counsel to provide copy of the Submission.

1.9 Respondent provided copy of Submissions filed on 16 October 2015 to the Court.

2.0 BACKGROUND FACTS

2.1 Applicant was employed by Respondent in the Judicial Department as a Sheriff Officer with effect from 28 May 2002.

2.2 By memorandum dated 13 December 2011 the then Permanent Secretary of Justices and Anti Corruptions laid eight (8) charges against the Applicant for breach of Public Service Code of Conduct and by the said memorandum Applicant was required to respond to the charges in writing within fourteen (14) days.

2.3 By undated letter, received by Justice Department on 28 December 2011, Applicant denied the disciplinary charges laid against.

2.4 The Applicant appeared before the Public Services Disciplinary Tribunal ("**PSDT**") on the 12 September 2012, when the eight (8) disciplinary charges against the Applicant were heard.

2.5 Upon completion of the hearing Applicant made submissions of no case to answer and filed his Submissions with PSDT.

2.6 On 19 September 2012, the PSDT prepared its report and submitted it to the Respondent with the finding that there was sufficient evidence against the Applicant on all eight charges. Tribunal also highlighted technical defect in the charges in that date of committal of the offence was not stated.

2.7 Applicant at the request of the Respondent provided his comments on the PSDT's Report through Fiji Public Services Association.

2.8 The Respondent by Memorandum dated 30 November 2012, informed the Applicant that his employment has been terminated with immediate effect in accordance with Regulation 22(1) of Public Service (General) Amended Regulations 2008.

The Respondent also noted that Appellant did not appear during hearing of mitigation.

2.09 Applicant then filed Application for Judicial Review of Respondent's decision to terminate his employment being Judicial Review No 2 of 2013.

2.10 By Memorandum dated 29 May 2013, Respondent informed the Applicant that:-

(i) His termination has been revoked;

(ii) He will remain on suspension;

(iii) He will be called for mitigation.

2.11 By Memorandum 22 July 2013, Respondent informed Applicant of the mitigation date (31 July 2013) and invited Appellant to appear for mitigation.

2.12 Appellant did attend the mitigation.

2.13 Respondent by memorandum dated 29 July 2013, informed Applicant that his employment has been terminated.

3.0 LAW

3.1 Order 53 Rules 1 to 3(1) of the High Court Rules provide:-

“1.(1) An application for an order of mandamus, prohibition or certiorari shall be made by way of an application for judicial review in accordance with the provisions of this Order.

(2) An application for a declaration or an injunction may be made by way of an application for judicial review, and on such an application the court may grant the declaration or injunction claimed if it considers that having regard to:-

a) the nature of the matters in respect of which relief may be granted by way of an order of mandamus, prohibition or certiorari.

b) the nature of the persons and bodies against whom relief may be granted by way of such an order, and

c) *all the circumstances of the case, it would be just and convenient for the declaration for injunction to be granted on an application for judicial review.*

2. *On an application for judicial review any relief mentioned in rule 1(1) or (2) may be claimed as an alternative or in addition to any other relief so mentioned if it arises out of or relates to or is connected with the same matter.*

3. (1) *No application for judicial review shall be made unless the leave of the Court has been obtained in accordance with this rule.”*

3.2 The test for Application for Leave for Judicial Review was stated by her Ladyship Justice Scutt (as she then was) in **Nair v. Permanent Secretary for Education & Ors** Judicial Review No. 2 of 2008 as follows:-

- *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;*
- *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.*

3.3 It is apparent from the Submissions filed, that the Respondent is not challenging the standing of the Appellant or whether private law or public law remedy applies or whether Applicant has exhausted alternative remedy.

3.4 The only point of contention between the parties is whether Applicant has arguable case, is that whether this Court can overturn the Respondent's decision.

Arguable Case

3.5 The test for arguable case was stated by Lord Diplock in **Inland Revenue Commission v National Federation of Self Employed and Small Businesses Ltd** [1982] AC 617 as follows:-

“The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into matter at any depth at that stage. If, on a quick perusal of the material then available, the

court thinks that it discloses what might on further consideration, turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him, leave to apply for that relief. The discretion that the court is exercising at this stage is not the same as that which is it is called upon the exercise when all the evidence is in and the matter has been fully argued at the hearing of the application”.

3.6 The above test have been adopted and applied by Courts in Fiji.

3.7 In **Fiji Airline Pilots Association v The Permanent Secretary for Labour and Industrial Relations** Civil Appeal No. ABU00594 of 1997S (High Court Judicial Review No. HBJ 15 of 1997) the Court of Appeal in respect to Leave Application stated as follows:-

*“The basic principle is that the Judge is only required to be satisfied that the material available disclose what might on further consideration, turn out to be an arguable case in favour of granting the relief. If it does, he or she should grant the application per Lord Diplock in *Inland Revenue Commission v National Federation of Self Employed* [1982] AC 617 of 644. This principle was applied by this Court in *National Farmers Union v Sugar Industry Tribunal and Others* (CA 8/1990, 7 June 1990). In *R v Secretary of State for the Home Department exp Rukshanda Begum* [1990] COD107 (referred to in 1 Supreme Court Practice 1997 at pp 865 and 868) Lord Donaldson MR accepted that an intermediate category of cases existed when it was unclear on papers whether or not leave should be granted, in which event a brief hearing might assist, but it should not become anything remotely like the hearing would ensue if the parties were granted leave (page 9).”*

3.8 The reliefs sought by the Applicant and grounds for seeking such relief are stated in the Application for Leave for Judicial Review as follows:-

Relief

“(a) An order of Certiorari to remove the said decision made by the Public Service Commission on 26th July, 2013 and the same be quashed.

- (b) An order of Mandamus directing the Respondent to reinstate the applicant with immediate effect to his employment in the Public Service without any loss of benefits and entitlements.**
- (c) Further or in the alternative a declaration (In any event) that the decision of the Respondent is tainted with biasness, double standard, irrational, erroneous, and unreasonable.**
- (d) Damages**
- (e) Any further declarations or other relief as this Honourable Court may consider fit.**
- (f) Costs**

Grounds

- (a) That the Respondent had exceeded its jurisdiction and further abused its powers when it acted in bad faith when it failed to take into consideration the mitigating factors submitted by the applicant.**
- (b) That the manner in which the Commission reached its said decision to terminate the employment of the applicant was seriously flawed lacked transparency and impartiality as it executed the role of judge, Jury and executor.**
- (c) That the Respondent acted and unreasonably by relying upon the findings of the Public Service Disciplinary Tribunal, which was not conclusive as the disciplinary charges were defective.**
- (d) That the Respondent failed to disclose the process it invoked in finding the applicant guilty before inviting him for mitigation.**
- (e) That the Applicant was not given any opportunity to be heard on the quantum of penalty and further did not provide any lawful reasons why the manifestly harsh penalty was necessary and how the same decision was determined.**
- (f) That the Respondent acted unfairly and unreasonably when it imposed the decision of termination which was pre-conceived and the mitigation process was academic.**
- (g) That the irregular decision making process of the Respondent and its subsequent decision is susceptible to Judicial Review as there is no further right of remedy and the consequences of the original decision is of considerable seriousness to the Applicant,**

that only the inherent jurisdiction of the High Court can provide the appropriate relief.

(h) That the Applicant reserves the right to add further ground upon inspection of documents pursuant to a discovery order in terms of Order 53 Rule 4 and order 24 Rule 8.

3.9 As stated earlier His Lordship Justices Kotigalage (as he then was) adjourned this matter for ruling on preliminary issues raised by the Respondent in the Notice of Opposition filed by the Respondent.

3.10 With greatest of respect of I do not think that the matters raised by the Respondent in the Notice of Opposition is preliminary because what is raised by the Respondent goes to the root of this matter and that is “ whether this Court can overturn the decision of Respondent on merits?”.

3.11 Respondent in the Notice of opposition filed states as follows:-

“(1) No Reasonable cause of action/ no arguable case.

a) The Decision, which is the subject of challenge, is a decision that is made by the Public Service Commission upon the completion of proper hearing and decision of the Public Service Disciplinary Tribunal. The Applicant has filed a Judicial review application against the Respondents challenging the merits of the decision and not the process by which the Respondent reached the decision dated 26 July 2013.

b) Respondent complied with Section 28 of the Legal Notice 46 of 2009 in giving time to the Applicant to appear for mitigation.

c) The Applicant does not have an arguable case established on any of the grounds sought for Judicial review of the relevant decision.”

3.12 It is well settled that the Court will not interfere with decision of Government bodies, where the person against whom decision was made was not denied natural justice and procedural fairness.

3.13 This Court in **Lal -v- The Minister for Education, National Heritage, Culture and Arts and Another** [2014] Judicial Review No 5 of 2013 (17 July 2014) stated as follows:-

“Before proceedings any further I must state in very clear terms that function of the court in respect of judicial review applications are to look at process by which the decision was reached. If there was a need to afford Applicants procedural fairness to students and if so, the Applications were afforded such procedural fairness, Respondents complied with policy, procedures, guidelines and law then this Court will not interfere with the decision of the Respondents irrespective of the implications on the persons affected.”

3.14 The above comment has support in what said by Lord Templeman in **REG. v. Inland Revenue Commissioner, Ex parte Preston** (1985) A.C 835 at 862:

“Judicial review is available where a decision-making authority exceeds its powers, commits an error of law, commits a breach of natural justices, reaches a decision which no reasonable tribunal could have reached, or abuses its powers.”

3.15 Relevant provisions of Public Service (Discipline) Regulations 2009 are Regulations 16(1), 20, 21(1), 26(1), 27(1)(2), 28,29,30 and 31 which provides as follows:-

“16-(1) ***Where-***

(a) a disciplinary action has been initiates against an employee by the disciplinary charges for a breach or breaches of the Public Service Code of Conduct; and

(b) upon service of the disciplinary charges, the employee has replied to the disciplinary charges has been denied the disciplinary charges,

The Commission, upon receipt of the disciplinary charges, the employee’s reply and such other documents submitted to the Commission by the relevant Ministry or Department, shall refer the disciplinary charges and all other documentary materials received to the Tribunal.

Tribunal Hearing to be private

20. The hearing of a disciplinary charge shall be held in private:

provided that the following persons shall be allowed to be present at the hearing:

- (a) the employee, or a representative of the employee;***
- (b) the permanent secretary or the head of department of the relevant ministry or department;***
- (c) any person appearing on behalf of the ministry or department;***
- (d) the members and the permanent secretary of the Commission, and any person appearing on their behalf;***
- (e) any other person whom the Tribunal in its discretion allows to be present.***

Hearing before the Tribunal

21 The Tribunal shall hear all disciplinary charges referred to it by the Commission.

Tribunal to submit report

26 - (1)At the end of the hearing, the tribunal shall make a report to the Commission containing its finding on the facts and evidence presented and an expression of opinion as to the meaning and value of the facts found.

Disclosure of Report

27- (1)Upon receipt of the report under regulation 26, the Commission shall disclose the report and the record of the proceedings of the Tribunal to the employee and the relevant Ministry or department, shall invite the employee and the ministry or department or their representatives to make representations by way of submissions to the Commission and to state their views on their findings of the Tribunal.

(2) The Commission shall consider the submissions made by the employee and the relevant ministry or department before making any decision.

28. Commission to decide on guilt

The Commission shall consider the report of the Tribunal submitted to the Commissioner under regulation 26 and any submissions made to the Commission by the employee or the ministry or department or their representatives under regulation 27, and make a decision on whether or not the employee has breached the Public Service Code of Conduct.

29. Mitigation hearing

If the Commission is satisfied that the employee has breached the Public Service Code of Conduct and is guilty of one or more disciplinary charges brought against the employee, the Commission shall inform the employee of its decision, and shall invite the employee or its representative to be heard in mitigation. At this hearing, the ministry or department or its representative shall also be entitled to appear and be heard by the Commission.

30. Disciplinary Action

After hearing the employee or its representative in mitigation, or if the employee fails to appear before the Commission for a hearing in mitigation under regulation 29, the Commission may then take disciplinary action and take one or more of the actions prescribed in regulation 22(1)(a) to (h) of the Public Service (General) Regulations 2009 (as amended).

31. Notification of decision

The Commission shall, within 7 days, notify an employee in writing, of its decision made under regulation 30.”

- 3.17 It is clear from what is stated in the Applicant 1st Affidavit that the Respondent complied with the above provisions.
- 3.18 The Respondent after realising that it made the decision to terminate the Appellant without hearing the Applicants in mitigation it revoked its earlier decision and gave Applicant the opportunity to mitigate.
- 3.19 In this instance I make following findings:-

- (i) Upon laying disciplinary charges against the Appellant and upon the Applicant denying the charges, the Respondent referred the charges and document any evidence to the Tribunal (Regulation 16(1);
- (ii) Tribunal conducted hearing and the Applicant as employee was present at the hearing. (Regulation 20)
- (iii) Tribunal heard all charges laid against the Applicant (Regulation 21(1))
- (iv) The Tribunal prepared a report and submitted to the Respondent (Regulation 26(1)).
- (v) Report was sent to the Applicant inviting him to make representation by Submission which applicant did. (Regulation 27-(1))
- (vi) The Respondent did consider the Submissions before it made its decision. (Regulations 27-(2) and 28)
- (vii) Even though the Respondent made its initial decision to terminate Applicants employment without giving Applicant opportunity to mitigate it becoming aware of this failure revoked as decision and gave the Applicant opportunity to mitigate. (Regulation 29).
- (viii) The Respondent took the disciplinary actions against the Applicant only after hearing the Applicant and giving opportunity to Applicant to mitigate. in mitigation. (Regulation 30).

4.0 Natural Justice - Procedural and Fairness

4.1 The right to afford natural justice and procedural fairness has been very well stated in the case of **Annets v McCain** (1990) 170 CLR 596 at 598 by Mason C.J Deane and McHugh JJ and adopted with approval in **Divendra Pillay Permanent Secretary for Education, Women & Culture & Anor** Judicial Review No 5 of 1997 as follows:

“It can now be taken as settled that, when a statute confers power upon a public official to destroy, defeat or prejudice a person’s rights, interests or legitimate expectations, the rules of natural justice regulate the exercise of that power unless they are excluded by plain words of necessary intendment: Commissioner of Police v Tanos (1958) 98 CLR 383 at 395-396; “Twist v Randwick Municipal Council (1976) 136 CLR 106 at 109-110; Heatley v.

Tasmanian Racing & Gaming Commission (1977) 137 CLR 487 at 496, 500; J v Lieschke (1987) 162 CLR 447 at 456; Haoucher v Ministry for Immigration & Ethnic Affairs (1990) 169 CLR 648 at 680. In Tanos (1958) 98 CLR at 396, Dixon CJ and Webb J said that an intention on the part of the legislature to exclude the rules of natural justice was not to be assumed nor spelled out from ‘indirect references, uncertain inference or equivocal considerations’. Not in such an intention to be inferred from the presence in the statute of rights which are commensurate with some of the rules of natural justice: Baba v Parole Board (NSW) (1986) 5 NSWLR 338 at 344-35, 347-349. In Kioa v West (1985) 159 CLR 550 at 584, Mason J said that the law in relation to administrative decisions, has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affects rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary intention.”

- 4.2 As stated earlier and at paragraph 3.19 the Applicant was afforded returned justice and procedural fairness in that he was heard by the Tribunal in person, he was provided with Tribunals report, and was given opportunity to mitigate prior to disciplinary actions being taken against him.
- 4.3 On the basis of my finding in respect to compliance with Public Service (Discipline) Regulation by the Respondent and there being no evidence of any breach of natural justice or procedural fairness, I have no alternative but to dismiss the Applicant’s Applications for Leave to Apply for Judicial Review on grounds that he has failed to establish that he has an arguable case.

Costs

- 5.0 I take into consideration the Respondent only filed Answering Affidavit, Notice of Opposition and Submissions, the Applicant did not turn up for hearing and the nature of the proceedings.

6.0 Order

6.1 I make the following Orders:

- i. Applicants Application for Leave to Apply for Judicial Review of the Respondent's decision dated 26 July 2013, filed on 15 August 2013 is dismissed and struck out.
- ii. Each party bear their own costs.



At Suva

31 March 2016

Applicant in Person

Office of the Attorney-General for the Respondent