

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Judicial Review No: **HBJ 15 of 2015**

IN THE MATTER of an application by
BASUNDRA KUMAR for **LEAVE** to
apply for Judicial Review under Order
53 Rule 3(2) of the High Court Rules of
Fiji

AND

IN THE MATTER of a decision of the
Permanent Secretary for Education,
Heritage and Arts dated 2 July 2015
terminating the employment of the
Applicant

<u>STATE</u>	-v-	<u>PERMANENT SECRETARY FOR EDUCATION, HERITAGE AND ARTS</u>	<u>RESPONDENT</u>
<u>EX-PARTE</u>	:	<u>BASUNDRA KUMAR</u>	<u>APPLICANT</u>
<u>BEFORE</u>	:	The Hon. Mr Justice David Alfred	
Counsel	:	Mr D Sharma for the Applicant Ms S Ali, Ms K Naidu with her, for the Respondent	
Date of Hearing	:	19 April 2016	
Date of Judgment	:	29 April 2016	

JUDGMENT

1. This is an Application for Judicial Review whereby the Applicant seeks the following remedies:

- (a) An Order of Certiorari to quash the decision made by the Respondent on 2 July 2015 terminating the employment of the Applicant.
- (b) An order of Mandamus directing the Respondent to reinstate the Applicant to her employment in the Public Service with immediate effect.
- (c) A Declaration that the decision of the Respondent is, inter alia, biased, irrational, erroneous and unreasonable.

2. The grounds of the Application are the following:

- (1) The Respondent's decision of termination was unlawful and ultra vires.
- (2) The Respondent's failure to refer the disciplinary action to the Public Service Disciplinary Tribunal for determination was a denial of natural justice and procedural fairness.
- (3) The Respondent failed to comply with the requirements of Section 120 of the Constitution.
- (4) The Respondent failed to comply with the provisions of Regulation 22 of the Public Service Regulations, 1999.
- (5) There was procedural impropriety in the decision making process of the Respondent.
- (6) The Applicant was denied her rights under the principles of natural justice and Section 15(2) of the Constitution.
- (7) The irregular decision making process and decision is susceptible to judicial review as there is no further right of remedy.

3. The Applicant in her Affidavit in Support of her application, traced the history of her case and concluded with her belief that she was entitled to judicial review.

4. In her Affidavit in Reply, the Respondent outlined the various actions undertaken by her, stated the termination of the Applicant's employment was made pursuant to her contract, and asserted that such decision to terminate was not subject to judicial review.

5. The Applicant in her Affidavit in Response to the Respondent's Affidavit, in essence, joined issue with the Respondent.
6. I also take note of the Notice of Opposition of the Respondent, the fundamental elements of which, are that the decision is not amendable to judicial review, the application is an abuse of process and the Applicant has no arguable case.
7. The hearing commenced with the Applicant's Counsel's submission. He outlined what had transpired and said that once the matter was referred to the Public Service Commission, the Permanent Secretary (the Respondent) cannot terminate the Applicant's employment.
8. The Applicant had never been summoned to appear before the Tribunal and once the Public Service Tribunal provision is invoked, it has to proceed to the end and not be withdrawn at some earlier stage. The Respondent gave the Applicant an expectation of a hearing and then changed her mind.
9. Counsel asked for the Respondent's decision to be quashed and stated that even if Judicial Review were granted, the Applicant's resignation stays in effect.
10. Counsel for the Respondent then submitted that judicial review was not the correct relief for this matter. This was a private matter and the Applicant's rights are to be found within the contract. It is not a matter of public interest.
11. The Applicant's Counsel replied. He said the Applicant is subject to the Public Service Regulations. The Respondent went outside the contract. It was the Public Service Commission which had the power to dismiss, not the Respondent.
12. With the conclusion of the hearing, I informed I would take time to consider my decision. I now proceed to deliver my judgment.
13. At the outset, I must take note of an argument advanced by Counsel for the Respondent, which raises a question of importance in administrative law.

14. The question, shortly stated, is: Is the decision of the Respondent susceptible to Judicial Review. Counsel for the Respondent relied on the English Court of Appeal decision in *R v East Berkshire Health Authority, ex parte Walsh* [1984] 3 All ER 425 to say it is not.
15. In that case, the applicant was employed as a senior nursing officer by the respondent health authority under a contract of employment which, pursuant to the National Health Service (Remuneration and Conditions of Service) Regulations 1974, incorporated terms and conditions approved by the Secretary of State for Social Services. The district nursing officer terminated the applicant's employment with the health authority. The applicant sought judicial review of the dismissal, on the grounds that the district nursing officer had acted ultra vires in dismissing him and that there had been breaches of the rules of natural justice in the procedures leading up to the dismissal.
16. On appeal, the Court of Appeal held that whether a dismissal from employment by a public authority was subject to public law remedies depended on whether there were special statutory restrictions on dismissal which underpinned the employee's position, and not on the fact of employment by a public authority per se or the employee's seniority or the interest of the public in the functioning of the authority. Where the authority was required by statute to contract with its employees on specified terms with a view to the employees acquiring private law rights, a breach of that contract was not a matter of public law and did not give rise to any administrative law remedies: it was only if the authority failed or refused to contract on the specified terms that the employee had public law rights to compel the authority to comply with its statutory obligations. The fact that the applicant was employed on conditions of service which were negotiated by a negotiating body, were approved by the Secretary of State and were imposed on the applicant and the authority by the 1974 regulations was not sufficient to give the applicant public law remedies in respect of his dismissal. Since the applicant had been engaged on the proper conditions of service and his complaint

was that he had been dismissed in breach of those conditions, his contract was an ordinary master and servant contract of employment and the appropriate remedy was the private law remedy of a complaint to an industrial tribunal. The application for judicial review was dismissed.

17. This decision was followed by the Fiji Court of Appeal in : *Palani v Fiji Electricity Authority* [1997] FJCA 21: ABU 0028.96 where the court held that judicial review is not applicable in a strict master and servant relationship based on a private contract of employment as there is no element of public law involved.
18. I also note that De Smith's *Judicial Review*, 6th edition, states that "where a public authority takes action in relation to an employee, such as disciplinary action or termination of an employment relationship, this will normally be matter for contract or employment law rather than judicial review" (see 3-066).
19. If the Applicant is to succeed in her Application for Judicial Review, she has to show at this initial stage she has an arguable case entitling her to proceed to the next stage which will be the substantive hearing. To do this, she has to satisfy me that the dismissal was either ultra vires, or it was unreasonable in the *Wednesbury* sense or it was in breach of the rules of natural justice.
20. The Respondent, for her part asks for the Application to be dismissed because the Applicant had no cause of action which was capable of becoming the proper subject of an application for leave.
21. This would necessitate my conducting a review of the terms of the contract, which I would described as the governing document to ascertain if the procedure or the process leading to the decision can be impugned on any of the grounds that I have adumbrated.
22. The contract was made on 17 October 2013 between the Respondent and the Applicant (the contract).

23. Therein, the Respondent is called “the Government”, and the “Applicant the Officer”. The relevant clauses are the following:
9. The Government may, without prejudice to clause 10, terminate the contract:
 - (a) by giving the officer not less than 1 month’s written notice of the date upon which the contract will be terminated.
 - (b) at any time by giving in lieu of the aforesaid notice, 1 month’s basic salary.
 10. Relates to summary dismissal and is not relevant here.
 11. The Officer may terminate the Agreement:
 - (a) by giving not less than 30 days written notice of the date upon which she proposes to terminate the Contract OR:
 - (b) at anytime by paying the Government 30 days Salary in lieu of the aforesaid notice.
24. It is then necessary for me to trace the relevant links in the chain of events which led to this court action.
- (1) By a letter in writing dated 29 December 2014 the Respondent, acting under Section 127(7) of the Constitution, wrote to the Respondent. Para 1 of the letter reads as follows: *“By virtue of the powers vested in me under section 127(7) of the Constitution of the Republic of Fiji you are hereby Suspended from official duties without pay with effect from 30/12/2014 based from a preliminary investigation report received by the Public Service Commission. You are further advised that there will be an Independent body appointed by the Commission who will further investigate allegations against you.”*
 - (2) By an email dated 29 December 2014, amongst other recipients, the Respondent, the Applicant stated she resigned and attached her “resignation letter from the service.”

- (3) By another email dated 31 December 2014, again addressed to amongst other recipients, the Respondent, the Applicant stated she was “now formally withdrawing my resignation and ready to be investigated. I wish truth to surface and evil to end for good.”
- (4) By a letter dated 8 January 2015, the Respondent wrote to the Applicant stating, inter alia, that she “accepted the withdrawal of your resignation.”
- (5) By the Applicant’s letter dated 30 June 2015, addressed to “The Permanent Secretary for Education” she informed the Respondent that: “I wish to tender in my resignation from the Ministry of Education effective from 30th July 2015.”
- (6) By a letter dated 2 July 2015, addressed to “Ms Basundra Kumar, Deputy Secretary of the Ministry of Education, Heritage and Arts” the Respondent informed the Applicant, inter alia, that:
 7. *I therefore find that you have breached the terms and conditions of your contractual employment under your Contract of Employment dated 17 October 2013.*
 8. *Given the above, pursuant to clause 9(b) of your Contract of Employment and following agreement of the Honourable Minister, your contract of employment with the Ministry of Education is hereby terminated.*
 9. *You will be paid the equivalent of 30 days’ remuneration in lieu of notice in addition to any outstanding pay, leave or other entitlement.*

25. Thus, it was clear that at the material time that both sides were at one in considering that the Applicant was no longer the Acting Permanent Secretary. Therefore as a Deputy Secretary she no longer comes within the ambit of Section 126(1) of the Constitution where her appointment and removal would have been the functions of the Public Service Commission. Thus it follows, as the night the

day, her appointment and removal are governed by the terms of her contract of employment.

26. I also note from a perusal of Section 127(7) of the Constitution that the Permanent Secretary of each Ministry has the authority to, inter-alia, remove “all staff of the Ministry, with the agreement of the Minister responsible for the ministry.”
27. The fact that the Applicant was a public servant and her employer was a Government Ministry did not, ipso fact, convert an employee/employer situation from a private law one to a public law situation where judicial review becomes available. I prefer to use the terms employee and employer rather than the obsolete terms of master and servant. If the Applicant were at the material time an employee of a private company employed under a contract, there would have been no contemplation of resorting to judicial review, if her employer had terminated her employment. Why then should the Applicant feel entitled to apply for a review by the Court of her employer’s decision to terminate her employment in accordance with their contract, just because the employer is a Ministry of Government.
28. A normal, ordinary employee/employer unfair dismissal dispute like that in the East Berkshire Appeal would have been determined by an industrial tribunal (employment tribunal in Fiji). In fact, one of the Appeal Judges, May LJ said that if as contended by counsel for the applicant, one of his client’s principal objects in initiating his judicial review proceedings was “to clear his name”, that could have achieved by obtaining a finding from the tribunal. In May LJ’s opinion the application was a misuse of Order 53. My opinion of the instant application is the same. If the Applicant’s intention here is to clear her name, then judicial review is not the proper vehicle to utilize to achieve that objective.

29. The remedy of Judicial Review is only available where an issue of public law is involved. In other words the decision impugned has been made by the State qua State. That has to be the preceding immediate cause which makes judicial review available. There is no such issue in an ordinary relationship of employer and employee, such as in the instant case and no such issue arises just because the employee is in a higher or more senior grade. The issue whether the dismissal is unfair or is valid has to be determined from within the 4 corners of the contract.
30. I find the Applicant terminated the contract, in effect, pursuant to clause 11(a) thereof, because her letter of resignation dated 30 June 2015 is stated to take effect from 30 July 2015. And the Respondent on 2 July 2015 terminated the contract, pursuant to clause 9(b) thereof.
31. Thus, in my view, not to put too fine a point on it, both Applicant and Respondent have terminated the contract of employment. The former has evinced her desire not to serve the Ministry of Education any longer, and the latter has expressed her desire to forthwith terminate the employment of the former. In the result the Applicant has no ground to question the termination of her employment either in public law or in private law.
32. The surplusage before me did not cause me to be unable to see the wood for the trees, for I discern no element of public or administrative or constitutional law present that would make this matter susceptible to judicial review.
33. This renders otiose any further consideration of the various other issues that have surfaced as a result of the meandering of both parties in their courses leading up, by coincidence of course, to a parting of the ways. It is also inexpedient to discuss the laws and the other cases cited.

34. In fine, for all the above reasons, I find and so hold that the Applicant has failed to show an arguable case for each ground of relief fit to be considered in a substantive hearing and her Application is devoid of merit.
35. I therefore dismiss the Application, for leave to apply for judicial review of the decision of the Respondent, with costs which I summarily assess at \$1,000.00 to be paid by the Applicant to the Respondent.

Delivered at Suva this 29th day of April, 2016.



DAVID ALFRED

JUDGE of the High Court of Fiji