

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Judicial Review No. HBJ 8 of 2014

IN THE MATTER of the **PUBLIC SERVICE**
DISCIPLINARY TRIBUNAL

AND

IN THE MATTER of an application by the
PERMANENT SECRETARY FOR
MINISTRY OF WORKS, TRANSPORT AND
PUBLIC UTILITIES for a Judicial Review
and with other reliefs including an Order of
Certiorari to quash the decision made by
the Public Service Disciplinary Tribunal

BETWEEN : **PUBLIC SERVICE DISCIPLINARY TRIBUNAL**
Respondent

EX-PARTE : **THE PERMANENT SECRETARY FOR MINISTRY**
OF WORKS, TRANSPORT & PUBLIC UTILITIES
Applicant

LITIANA DIANI
Interested Party

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

COUNSEL : Ms. T. Sharma and Ms. L. Bali for the Applicant
Mr. A. Katonivualiku for the Respondent
Interested Party in Person

DATE OF RULING : 29 April 2016

RULING

(Application for Leave to Apply for Judicial Review)

1. INTRODUCTION

- 1.1 On 18 July 2014, the Applicant filed Application for Leave to Apply for Judicial Review of the decision of the Respondent dated 28 November 2013, directing Applicant to reinstate the employment of Litiana Diani, the Interested Party pursuant to Order 53 Rule 3(2) of the High Court Rules (**“the Application”**).
- 1.2 On the same day Applicant filed Application for Stay of implementation of Respondent’s decision until further order of this Court.
- 1.3 On 26 August 2014, the Applications were called before this Court when:-
- (i) Mr. A. Katonivualiku, the Chairman for the Respondent appeared and informed the Court that Respondent is not objecting to Applicant’s Application for Leave to Apply for Judicial Review;
 - (ii) Interested Party and Applicant were directed to file Affidavits and Submissions;
 - (iii) Both Applications were adjourned to 23 September 2014 for review.
- 1.4 On 23 September 2014, the Court granted parties time to file Submissions in Reply by 7 October 2014, and both Applications were adjourned for hearing on 6 November 2014 at 9.30am.
- 1.5 On 6 November 2014, Mr Katonivualiku, the Chairman of the Respondent confirmed that Respondent is not objecting to Application for Leave to Apply for Judicial Review.
- 1.6 Thereafter Applicant and Interest Party made Submissions.
- 1.7 Following Affidavits were filed on behalf of the parties:-

Applicant

- i. Affidavit in Support of Francis Kean sworn on 17 July 2014 (**“Kean’s 1st Affidavit”**);
- ii. Affidavit in Reply of Francis Kean to Interested Party’s Affidavit sworn on 21 August 2014 (**“Kean’s 2nd Affidavit”**).

Respondent

Affidavit of Aminiasi Katonivualiku sworn on 1 August 2014 (**“Katonivualiku’s Affidavit”**)

Interested Party

Affidavit of Litiana Diani, the Interested Party sworn on 6 August 2014 (“**Diani’s Affidavit**”).

2.0 BACKGROUND FACTS

- 2.1 Interested Party was employed in the Government Printing Department as a Clerical Officer, with effect from 5 November 2002.
- 2.2 Interested Party was transferred to Ministry of Works and Transport under same terms and conditions, with effect from 3 March 2009.
- 2.3 By internal memorandum dated 29 March 2010, the Interested Party was informed about deduction of her salary for accumulating ten hours fifteen minutes of late arrival for the months of January and February 2010 and reminded to adhere to instructions including PSC Circular on attendance and unauthorised leave (Annexure “FK6” of Kean’s 1st Affidavit).
- 2.4 On 6 May 2010, a similar internal memorandum was sent to the Interested Party informing her about deduction of five hours and thirty minutes of salary for January 2010 only, with reminder to adhere to instructions on attendance and unauthorised leave (Annexure FK7 of Kean’s 1st Affidavit).
- 2.5 From 30 July to 18 October 2010, fourteen (14) internal memorandums were sent to the Interested Party informing her about deduction in her salary for having accumulated hours in late arrival and sick leave entitlement for the period June 2010 to October 2010, and breach of General Order 302 (b) and reminding her to adhere to the instruction and PSC Circulars on the attendance and unauthorised leave (Annexure “FK8” to “FK21” of Kean’s 1st Affidavit).
- 2.6 In the internal memorandums mentioned in preceding paragraph the Interested Party was also informed that if her conduct continued, then disciplinary action would be taken against her.
- 2.7 On 18 January 2013, the Respondent by internal memorandum to the Interested Party:-
 - (i) Informed her that despite various counselling, caution and warning she has not heeded to the advice given to her and continues to be late for work;

- (ii) Highlighted the dates she had been counselled by her Supervisor, the Principal Accounts Officer (“**PAO**”) and Director Administration and Finance in the presence of the Supervisor and PAO;
 - (iii) Upon powers vested in him under Legal Notice No. 92/2001 and Public Service Regulation he suspends her indefinitely, without pay with immediate effect until conclusion of disciplinary proceedings by Public Service Commission in accordance with Public Service Regulation 23(2) (Annexure “FK22” of Kean’s 1st Affidavit).
- 2.8 The Interested Party was interviewed by the Department (Annexure “FK23” of Kean’s 1st Affidavit).
- 2.9 The Respondent then laid four (4) charges against the Interested Party and the Interested Party was served with the charges and memorandum advising her that if she wishes, she must respond to the charges within fourteen (14) days (Annexure “FK24” of Kean’s Affidavit).
- 2.10 There is no evidence of any response from the Interested Party to the charges served on her.
- 2.11 The Respondent then referred the charges to PSC and forwarded all the caution letters, warning letters which included letters regarding deduction of salaries and suspension letter to the Respondent.
- 2.12 The Respondent heard the charges on or about 10 July 2013, and delivered its Ruling on 30 July 2013.
- 2.13 Ruling was submitted to PSC, who then returned the file to the Respondent to determine disciplinary action to be taken against the Interested Party.
- 2.14 On 6 November 2013, the Respondent invited the Applicant and the Interested Party to mitigate on 28 November 2013.
- 2.15 On 27 November 2013, Applicant wrote to the Respondent recommending that Interested Party’s employment with Applicant be terminated (Annexure “FK25” of Kean’s 1st Affidavit).
- 2.16 On 28 November 2013, the Respondent delivered its decision and made following Orders:-
- “(i) *This accused to forfeit all her salaries withheld during the period of her suspension;*

(ii) *Since she is a first offender she be given a final chance and that she be reprimanded not to re-offend. Should she re-offend, the Permanent Secretary to exercise his authority under Section 127(7) of the Constitution of the Republic of Fiji instead of charging her and referring the matter to this Tribunal.”*

3.0 Preliminary Issues

3.1 It is with much regret I note that the Applicant and the Interested Party have failed to comply with Order 41 Rule 9(2) of the High Court Rules 1988.

3.2 Current Chief Justice, His Lordship Justice Gates and other Judges of this Court have highlighted time and again the failure by parties in particular their Solicitors to comply with order 41 Rule 9(2) of the High Court Rules 1988. Order 41 Rule 9(2) provides as follows:

“Every Affidavit must be indorsed with a note showing on whose behalf it is filed and the dates of swearing and filing and an Affidavit which is not so indorsed may not be filed or used without the leave of the Court.”

3.3 In **Jokapeci Koroi & Ors. v Commissioner of Inland Revenue & Anor.** (unreported) Lautoka High Court Action No. HBC179/2001L (24 August 2001) his Lordship Justice Gates, the Current Chief Justice of the High Court of Fiji removed two (2) Affidavits filed on behalf of the Defendants from the Court file for failure to comply with Order 41 Rule 9 (2) and ordered the Defendants to file the said Affidavits with indorsement in compliance with Order 41 Rule 9(2) within 14 days. His Lordship at page 4 of the Judgment stated as follows:

“These mistakes are of little consequence to the actual litigation but since the setting of the format of an Affidavit, vehicle for the presentation of sufficient evidence to the Court, is a relatively simple exercise, these errors should no longer persist.”

3.4 In view of the nature of the proceedings and need to finalise this matter quickly I will use the Affidavits even though they do not have the indorsement. However, the litigants and their counsel should take note of the fact that failure to comply with Order 41 Rule 9(2) and failure to obtain

Court's leave to utilize these Affidavits could result in the Affidavits being removed from the court file which of course will be fatal to their case.

4.0 LAW

4.1 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.”

4.2 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?***

4.3 It is undoubted that Applicant being the employer of the Interested Party, and being the one who laid the charges against the Interested Party, has sufficient interest in the matter and the decision of Respondent is of public nature.

4.4 Also there is no issue as to whether Applicant has any alternative remedy.

4.5 The only point of contention between the parties is whether Applicant has arguable case.

Arguable Case

4.6 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 to exercise when all the evidence is in and the matter has been fully argued at the hearing of the application.”

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

- 4.8 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).”

- 4.9 The reliefs sought by the Applicant and grounds for seeking such reliefs is stated in the Application for Leave to Apply for Judicial Review as follows:-

Relief

- (a) *An Order of Certiorari to remove the decision of the Public Service Disciplinary Tribunal contained in the report dated 28 November 2013, purportedly made under section 120(9)(b) of the Constitution of Fiji 2013 wherein the Tribunal has directed the Ministry of Works, Transport and Public Utilities to reinstate Litiana Diani;*
- (b) *An Order of Prohibition prohibiting the Public Service Disciplinary Tribunal giving effect to the decision of the Tribunal contained in the 28 November 2013 report wherein the Tribunal has directed the Ministry of Works, Transport and Public Utilities to reinstate Litiana Diani;*
- (c) *Further or in the Alternative, a Declaration (in any event) that the decision of the Public Service Disciplinary Tribunal is unreasonable;*

- (d) Damages;
- (e) Costs;
- (f) Any Further Declarations or other relief as this Honourable Court may see fit.

AND for the following further interim reliefs:-

- (a) A stay of the implementation of the decision of the Public Service Disciplinary Tribunal;
- (b) A Certiorari and Prohibition to maintain the status quo prevailing prior to 28 November 2013.”

4.10 Lord Templeman in **REG. v. Inland Revenue Commissioner, Ex parte Preston** (1985) A.C 835 at 862 stated as follows:-

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

4.11 The grounds for review of the decision are as follows:-

- (i) Respondent failed to consider relevant factors;
- (ii) Respondent took into account irrelevant factors;
- (iii) Respondent’s decision was made improperly;
- (iv) Respondent’s decision was irrational and unreasonable.

4.12 The Applicant states that the Respondent failed to consider that the Interested Party “*had been given sixteen notifications, warnings and reminders regarding her late arrivals and being absent without leave and two counselling sessions over a period of three years which proved that the Employee was a recurrent and frequent offender whose conduct breached the Public Service Code of Conduct and the General Orders.*”

4.13 At paragraph 42 of Kean’s 1st Affidavit he states as follows:-

“That between 19 June and 28 June 2013 all caution letters, warning letters, letters of counselling, letters regarding deduction of salary and letter of suspension were disclosed to the Tribunal for decision making during the disclosure period prior to hearing of the disciplinary action.”

4.14 In response to paragraph 42 of Kean's 1st Affidavit, the Respondent in Katonivualiku's Affidavit state as follows:-

"42. I confirm receiving all the documents on those dates."

4.15 In respect to paragraph 46 of Kean's 1st Affidavit, Respondent in Katonivualiku's Affidavit states as follows:-

"46. That in reaching its decision the Tribunal failed to consider the relevant factors that the Employee had been given sixteen notifications, warnings and reminders regarding her late arrivals and being absent without leave and two counselling sessions over a period of three years which proved that the Employee was a recurrent and frequent offender whose conduct breached the Public Service Code of Conduct and the General Orders."

4.16 It is therefore, not disputed that Respondent had all documents mentioned in paragraph 46 of Kean's 1st Affidavit, but did not consider it because Applicant's witness did not put those documents in evidence.

4.17 It is well established that quasi-judicial bodies like the Respondent is not bound by rules of evidence.

4.18 This Court then has to determine, as to whether Respondent should have referred the said documents to the Interested Party and sought her response and considered those documents in its decision making.

4.19 Applicant submits that, the Respondent took into consideration irrelevant such as the fact that the Interested Party was a first offender because, Interested Party has appeared before the Respondent only once.

4.20 Applicant submits that, the Respondent's decision was improper, irrational and unreasonable on the ground that, it wrongly applied the constitutional right of freedom from cruel and derogatory treatment, when the issue before the Respondent was about the Interested Party's employment and disciplinary charges.

4.21 The Respondent's Report to PSC was not annexed to any of the Affidavits filed. It is apparent that the Respondent found that the Interested Party breached the Public Service Code of Conduct as charged. If so, then there is no question of cruel and degrading treatment under the Constitution.

- 4.22 After making the finding, that Interested Party breached Public Service Code of Conduct as charged and the Respondent after hearing mitigation was supposed to deliver a rationale decision on sentence.
- 4.23 The grounds raised by the Applicant to establish that Respondent's decision was improper, irrational and unreasonable raises arguable case which needs to be determined at the substantive hearing of the Judicial Review Application.

5.0 APPLICATION FOR EXTENSION OF TIME

- 5.1 I will now consider the Application for extension of time and the issue of delay.
- 5.2 Order 53 Rule 4 of High Court Rules provides as follows:-

“4-(1) Subject to the provisions of this rule, where in any case the Court considers that there has been undue delay in making an application for judicial review or, in a case to which paragraph (2) applies, the application for leave under rule 3 is made after the relevant period has expired, the Court may refuse to grant –

- (a) leave for the making of the application, or
(b) any relief sought on the application,***

if, in the opinion of the Court, the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.

(2) In the case of an application for an order of certiorari to remove any judgment, order, conviction or other proceeding for the purpose of quashing it, the relevant period for the purpose of paragraph (1) is three months after the date of the proceeding.”

(3) Paragraph (1) is without prejudice to any statutory provision which has the effect of limiting the time within which an application for judicial review may be made.

- 5.3 The principal relief sought by the Applicant, is an Order for Certiorari and as such Order 53 Rule 4(2) applies in which case the Application for Leave to Apply for Judicial Review should have been filed by 28 February 2014.
- 5.4 The Applicant concedes that, the Application has been filed five months after the due date.
- 5.5 Respondent has no objection to the Application even though it is filed out of the prescribed time.
- 5.6 Whether to grant or not to grant leave, because of delay is a discretionary matter and what the Applicant has to do is to explain the reason for the delay and then this Court will need to consider, whether it is justifiable to grant such leave.
- 5.7 When considering whether it is justified or not this Court should take into account the position of the Respondent and the Interested Party.
- 5.8 The reason for delay, stated at paragraphs 5 to 14 of Kean's 1st Affidavit in brief are as follows:-
- (i) Tribunal made its decision on 28 November 2013;
 - (ii) On 5 December 2013, Applicant wrote to Fiji Court of Appeal seeking judicial review of the decision;
 - (iii) On 26 February 2014 (after two and half months), Court Registry wrote to Applicant advising that Applicant has to seek assistance of Attorney-General or Solicitor General's Office (Annexure "FK2" of Kean's 1st Affidavit);
 - (iv) Applicant was then advised by his Solicitors to obtain record of proceedings of the Tribunal;
 - (v) On 23 April 2014, Applicant received Tribunal Records;
 - (vi) On 24 April 2014, Applicant sent the Tribunal Records to Office of the Solicitor General;
 - (vii) Between 24 April 2014 and 4 June 2014, Applicant's Solicitor and his Office were engaged in verifying Tribunal Records which appeared to be incomplete;
 - (viii) On 5 June 2014, Applicant received advice from Solicitor-General's Office on process and procedure for Judicial Review;

(ix) Between 19 June 2014 and until filing of Application, Applicant and Solicitor General's Office were engaged in collecting necessary documents and compiling documents.

5.9 Save that Respondent's decision was delivered on 28 November 2013, and the Tribunal Records were collected from Respondent's Office and were delivered to Applicant, the Respondent in Katonivualiku's Affidavit states that it has no knowledge about the other reasons given by the Applicant.

5.10 The Interested Party in her Affidavit states as follows:-

- (i) Respondent in its Order stated that Applicant has 28 days to appeal;
- (ii) Applicant as Head of Government Department should have known the procedures to apply for Judicial Review;
- (iii) Applicant should have filed Application within thirty (30) days as provided in Order 53 Rule 4(2);
- (iv) There is no evidence to show that Tribunal's records were incomplete and that Applicant and his Solicitors were collecting documents and compiling documents and had put the Applicant to strict proof.

5.11 In respect to what is stated by Interested Party in her Affidavit, I state as follows:-

- (i) The time for filing of Application for Leave to Apply for Judicial Review in respect to Order for Certiorari as prescribed by Order 53 Rule 4(2) of High Court Rules is three (3) months.

The Respondent does not have the power to reduce the prescribed time limit.

- (ii) Whilst, I acknowledge that Applicant as Head of Government Department should have known the procedure for Judicial Review, but in this instance I find that Applicant was quite new to the system and genuinely did not know process and procedures. If he would have known then it is quite apparent that the Application would have been filed within the prescribed time.
- (iii) The standard of proof that is required in this case is on balance of probabilities and not strict proof.

5.12 I hold that Applicant's reason for delay is justifiable on the following grounds:-

- (i) Applicant wrote to Fiji Court of Appeal on 5 December 2013, only seven (7) days after the decision for Judicial Review;
- (ii) The Court wrote to him on 26 February 2014, which is almost two and half months after Applicant wrote advising him to seek advice from Attorney-General or Solicitor-General's office;
- (iii) Respondent's (Tribunal) Record was incomplete. The reason I say this is that Respondent in Katonivaliku's Affidavit does not deny this fact but states that he has "no knowledge".

5.13 Even though the Interested Party may suffer some hardship or prejudice I am satisfied that such hardship or prejudice will not be substantial as she is still receiving half her salary. It is also in the interest of good administration that reliefs and grounds for the reliefs raised by the Applicant be dealt by this Court.

5.14 In view of what I said at paragraphs 5.11 to 5.13 of this Ruling, I hold that the reasons for delay advanced by the Applicant are satisfactory and that the relief sought by the Applicant is justified.

5.15 I therefore have no alternative but to grant Applicant Leave to Apply for Judicial Review of the decision even though it is filed outside of prescribed time.

6.0 STAY OF IMPLEMENTATION OF RESPONDENT'S DECISION

6.1 In view of the nature of the proceedings I hold that it is just and fair to stay implementation of Respondent's decision until final determination of the Application for Judicial Review on the condition that Application for Judicial Review is filed within the time prescribed in Order 53 Rule 5 of the High Court Rules.

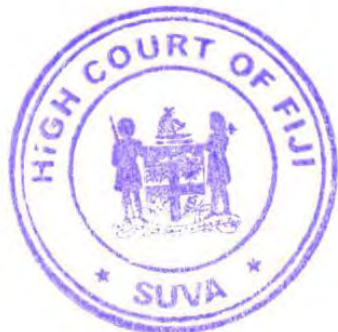
7.0 COSTS


I have taken into consideration that parties have filed Affidavits and Submissions, Respondent has not objected to the Application and the delay had been caused in filing the Application by the Applicant.

8.0 ORDERS

I make following Orders:-

- (i) Applicant is granted Leave to Apply for Judicial Review of Respondent's decision delivered on 28 November 2013, in respect to the Interested Party (Employment No. EDP 63028) out of prescribed time;
- (ii) Enforcement of Respondent's decision delivered on 28 November 2013, in respect to the Interested Party (Employment No. EDP 63028) be stayed until final determination of the Application for Judicial Review on the condition that Application for Judicial Review is filed within the time prescribed in Order 53 Rule 5 of the High Court Rules;
- (ii) Each party bear their own costs of the Application for Leave to Apply for Judicial Review, Application for Stay and Application for Extension of Time.




K. Kumar
JUDGE

At Suva

29 April 2016

Office of the Solicitor General for the Applicant

Mr. A. Katonivualiku for the Respondent

Interested Party in Person