

**IN THE HIGH COURT OF FIJI AT LABASA**  
**CIVIL JURISDICTION**

**Judicial Review No. HBJ 01 of 2014**

**BETWEEN** : **THE STATE**

**AND** : **PERMANENT SECRETARY FOR EDUCATION**

: **MINISTER FOR EDUCATION**

: **ATTORNEY-GENERAL OF FIJI**

**EX-PARTE** : **ANISH KUMAR DAYAL**

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

**COUNSEL** : **Mr A. Sen for the Applicant**

**Ms L. Ramoce for the Respondents**

**DATE OF RULING** : **3 June 2016**

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**RULING**

**Application for Leave to Apply for Judicial Review**

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## **1.0 INTRODUCTION**

- 1.1 On 28 November 2010, Applicant filed Application for Leave to Apply for Judicial Review in respect to First and Second Respondents decision made on 20 February 2014, to terminate Applicant's employment with Ministry of Education, Culture and Heritage. ("**the Application**")
- 1.2 On 9 September 2014, the Respondents filed Notice of Opposition.
- 1.3 On 22 September 2014, the Application was called before the then Master who directed the parties to file Affidavits and adjourned the Application to 27 October 2014, for mention.
- 1.4 On 27 October 2014, Applicant by his Counsel sought Leave to file Affidavit in Reply within twenty-one (21) days which leave was granted and the Application was adjourned to 25 November 2014, to fix hearing date.
- 1.5 On 28 November 2014, the Application was adjourned to 29 January 2015, for hearing.
- 1.6 The Application was next called on 30 January 2015, before the Master when Applicant by his Counsel sought further twenty-one (21) days to file Affidavit in Reply. The Court directed Applicant to file and serve Affidavit in Reply within twenty-one (21) days and adjourned the Application to 6 March 2015, for mention.
- 1.7 On 6 March 2015, Counsel for Applicant sought further time to file Affidavit in Reply which application was objected to by Respondents' Counsel. The Master however granted Applicant further twenty-one (21) days to file Affidavit in Reply and adjourned the Application to 2 April 2015, for mention.
- 1.8 On 2 April 2015, the Master adjourned the Application to 16 April 2015, to fix hearing date.
- 1.9 On 16 April 2015, the Application was set down for hearing on 7 July 2015, and was listed to be called on 20 April 2015, to confirm hearing date.
- 1.10 On 20 April 2015, the hearing date was confirmed.

- 1.11 On 7 July 2015, Counsel for the parties informed Court that they intend to file Submissions and agreed that upon filing of Submissions the Court could deliver ruling on notice.
- 1.12 Parties filed Submissions.
- 1.13 Following Affidavits were filed on behalf of the parties:-

**For Applicant:-**

- (i) Affidavit of Applicant sworn on 27 August 2014 (“**Applicant’s 1<sup>st</sup> Affidavit**”);
- (ii) Affidavit in Reply of Applicant sworn on 13 March 2015 (“**Applicant’s 2<sup>nd</sup> Affidavit**”)

**For Respondents:-**

Answering Affidavit of Basundra Kumar sworn on 20 October 2014 (“**Basundra’s Affidavit**”)

**2.0 BACKGROUND FACTS**

- 2.1 On 15 January 1997, the Applicant was appointed to the position of Grant-in-Aid Assistant Teacher at Waiqele Secondary School.
- 2.2 On 31 May 2001, the Applicant was given a temporary appointment as temporary teacher at Waiqele Secondary School.
- 2.3 On 2 March 2004, the Applicant was then posted to Labasa College as a Temporary Teacher.
- 2.4 On 30 November 2004, the Applicant was appointed to the position of Head of Department of Maths at Lomawai Secondary School on a probationary basis.
- 2.5 On 7 February 2007, the Applicant was transferred to Nadogo Secondary School to the position of Temporary Teacher.

- 2.6 On 15 May 2007, the Applicant was appointed to the position of Acting Vice Principal at Nadogo Secondary School.
- 2.7 On 5 May 2008, the Applicant was transferred to Waiqele Secondary School to the position of Head of Department Maths.
- 2.8 On 14 September 2009, the Applicant was appointed Acting Assistant Principal for Waiqele Secondary School.
- 2.9 On 23 January 2012, the Applicant was transferred to Rabi High School to the position of Vice Principal.
- 2.10 On 14 February 2012, the Applicant was transferred to Bua Central College to the position of Acting Vice Principal.
- 2.11 On 23 January 2013, the Applicant was transferred to Valebasoga Secondary School to the position of Acting Principal.
- 2.12 On or about 8 February 2013, Applicant was charged with one count of driving motor vehicle without a driving licence (Applicant was disqualified from driving for a period of 12 months on 17 May 2012) and one count of driving motor vehicle without third party policy.
- 2.13 The Applicant pleaded guilty to both charges and on 9 April 2013, the Applicant was sentenced by the Labasa Magistrates Court to eight (8) months imprisonment for driving without a licence during his period of disqualification from driving and driving without a third party policy insurance.
- 2.14 That the Applicant appealed the decision of the Magistrate Court to the Labasa High Court and on 30 May 2013, the High Court reduced his sentence to six (6) months imprisonment from 9 April 2013.
- 2.15 That the Applicant commenced serving his sentence on 9 April 2013, and from 26 June 2013, served his remaining sentence extramurally until his sentence was completed on 8 August 2013.
- 2.16 That Second Respondent suspended the Applicant without pay by way of letter dated 12 September 2013, and a copy of the disciplinary charges were served on the Applicant on 13 November 2013.

- 2.17 That the Applicant provided a response to the disciplinary charges to the Ministry by letter dated 14 November 2013.
- 2.18 On 20 February 2014, the First and Second Respondents wrote to Applicant informing the Applicant of the decision made by the First and Second Respondents to terminate the Applicant's employment with immediate effect.

### **3.0 DELAY**

- 3.1 I will now consider the Respondents Submission on delay.
- 3.2 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,***  
***(c) .....***

***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.”***

- 3.3 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 20 May 2014 (three months from 20 February 2014).

3.4 It is not disputed that the Application has been filed three months after the due date.

3.5 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 Respondent will suffer substantial hardship or substantial prejudice or whether it would be detrimental to good administration

3.6 In **Maisamoa v. Chief Executive Officer for Health** [2008]; Civil Appeal No. 80 of 2007 (10 July 2008) the Fiji Court of Appeal stated as follows:-

**“One of the principal features of judicial review as a remedy is that it must be instituted promptly. Indeed, Order 53, Rule 4 makes that plain from the language of the rule which requires that applications for leave must be made promptly and in any event within three months from the date when the grounds for the application first arose.”**

3.7 Court of Appeal also stated as follows:-

**“Nevertheless, the authorities recognize that the courts have discretion to extend time. Under the Rules the Court may extend time if the applicant shows there are good reasons for the delay.”**

3.8 In respect to reason for delay Court of Appeal stated as follows:-

**“It is elementary that if an indulgence is sought from the court such as an extension of time to permit proceedings for judicial review, as counsel for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondent submitted, it is incumbent upon the party seeking that review to place sufficient facts and circumstances before the court to justify such a course being taken.”**

3.9 In **Kamlesh Kumar v. State** Criminal Appeal No. CAV0001/09 and **Mesake Sinu v. State** Civil Appeal No. CAV001/10 his Lordship the Honorable Chief Justice Gates, President of the Supreme Court of Fiji dealing with Application For Leave to Appeal Out of Time stated as follows:-

***“[7] The rights of appeal are granted by statute within a framework of rules. Enlargement normally can only be granted because of specific powers granted to the appellate courts. No doubt because of a need to bring litigation to finality, once there is non-compliance, the courts can only exercise a limited discretion. Viliame Caubati AAU0022.03S 14th November 2003 at p.5.***

His Lordship also quoted the following from **Rhodes** Cr App. R 35 at 36:-

***“A short delay may be disregarded by the Court if it thinks fit, but where a substantial interval of time a month or more elapses, it must not be taken for granted that an extension of time will be allowed as a matter of course without satisfactory reasons.”***

- 3.10 The Applicant has not stated any reason as to why he did not file the Application within the prescribed time.
- 3.11 In **Maisamoa** case:-
- (i) On 20 July 2006, the Applicant applied for Leave to Apply for Judicial Review Public Service Appeals Board decision dated 10 May 2006;
  - (ii) On 1 September 2006, application was discontinued;
  - (iii) On 19 September 2006, Applicant filed fresh Application for Leave to Apply for Judicial Review;
  - (iv) Applicant was out of time by one month.
- 3.12 In **Maisamoa** case, even though Applicant was out of time by one (1) month and gave reasons for delay, Court dismissed the Application on the ground of delay.
- 3.13 No reason has been adduced by the Applicant for the delay and also Judicial Review of public authorities’ decision must be made promptly to ensure there is no hindrance to process of good administration.
- 3.14 The Applicant has delayed filing the Application by three months and has not given any reason for such delay and delay such as in this case is detrimental to good administration and against public policy.

3.15 I have no alternative but to dismiss and strike out the Application on the ground of delay as it is an abuse of Court process to file Application out of prescribed time without giving any reason for delay.

#### **4.0 COSTS**


I have taken into consideration that parties have filed Affidavits and Submissions, and the delay had been caused in filing the Application by the Applicant and the nature of the proceedings.

#### **5.0 ORDERS**

5.1 I make following Orders:-

- (i) Application for Leave to Apply for Judicial Review filed on 28 August 2014 is dismissed and struck out;
- (ii) Each party is to bear their own costs of the Application.



  
**K. Kumar**  
**JUDGE**

**At Suva**

**3 June 2016**

**Maqbool & Company for the Applicant**

**Office of the Attorney General of Fiji for the Respondents**