IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Judicial Review No.: HBJ 11 of 2015

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

AND

IN THE MATTER of an application by the **SOLICITOR-GENERAL** for a Judicial Review and with other reliefs including an Order of Certiorari to quash the decision made by the Public Service Disciplinary Tribunal ("the Tribunal") whereby the Tribunal has, on 03/02/2015, ordered that the submissions of the Applicant on time limitation be dismissed and that the Applicant file fresh amended disciplinary charges within the time limitation imposed by the Tribunal.

STATE	**V**	**PUBLIC SERVICE DISCIPLINARY TRIBUNAL**
		RESPONDENT
EX– PARTE	:	**THE SOLICITOR-GENERAL**
		APPLICANT
AND	:	**SALANIETA NAWAQAVOU**
		INTERESTED PARTY
Appearance	:	**Ms. Solimailagi O and Ms. Pranjivan R for the Applicant**
	:	**No Appearance for the Respondent**
	:	**Interested Party In Person**
Date of Hearing	:	**27th May, 2016**
Date of Judgment	:	**23rd June, 2016**

JUDGMENT

INTRODUCTION

1. The application for judicial review is relating to decision made by the Public Service Disciplinary Tribunal (PSDT) on 3rd February, 2015 where it ordered the Applicant to file fresh amended disciplinary charges against the interested party. The said decision was based on 'Limitation' contained in the circular PSDT Circular No 02/2014 (the Circular), issued by the Chairman of PSDT, which limited the time frame for 'matter/charge arose' to one year. The said PSDT Circular referred to the limitation referred to the Section 187 of Criminal Procedure Decree, 2009. The Applicant states that 'matters/charges' against the Interested Party were not criminal charges, hence there was no requirement to limit charges for a time period of 12 months. The relevant circular does not make any distinction between criminal and non criminal offences, as regard to the limitation and the Circular is not challenged in judicial review, but the decision based on the Circular.

FACTS

2. The Application for leave for judicial review was made on 1st May, 2015 and it was granted 3rd August, 2015 after a hearing on 23rd June, 2015. The Motion seeking judicial review was filed on 14th August, 2015 and since then numerous adjournments were sought by the Respondent to engage a counsel. First I was told that a legal practitioner would be engaged and the name was also informed but stated that terms of engagement contract needed ratification by Solicitor General (the Applicant in this case), several adjournments were obtained on the basis of finalizing the contract to engage said counsel by the authorities.

3. Later, this position was changed, and said that the Respondent would not be represented and by a counsel and they would only submit the record of the PSDT to the court. At this time the interested party who appeared in person was notified of the said decision of the Respondent and the Interested Party appeared in person at the hearing assisted by a person and had also submitted written submission at the hearing.

4. The Interested Party was employed as a Secretary in the Office of Attorney General and was suspended from her employment pending the outcome of the disciplinary proceedings.

5. The Interested Party was charged for offences relating to absenteeism by the Applicant for the period 2006-2014. These actions were dealt at the time they were committed without proceeding to filing a charge for termination.

6. The charges relate to the Interested Party being absent several occasions, without prior leave from 15th May, **2006** to 22nd July, **2014**. It is alleged that Interested Party took excessive leave despite being warned and counseled to improve her attendance. So, the disciplinary charges filed by the Applicant relate to 8 year time period.

7. On 23rd September, 2014 she was served with the disciplinary charges. The Interested Party replied to it on 10th October, 2014. The said charges and reply was forwarded to PSDT in terms of Sections 6 and 7 of the Public Service Act, 1999 in order to consider appropriate disciplinary action against the Interested Party. The Interested party took an objection on 'limitation' to the charges, as they relate to a period of 8 years.

8. The PSDT delivered ruling on 3rd February, 2015, and it ordered that the Applicant to file fresh amended disciplinary charges confined to 12 month time period.

9. Any decision of the PSDT can be subject to judicial review in terms of Section 120(10) of the Constitution of the Republic of Fiji

10. The Applicant seeks judicial review of the said ruling of the PSDT in following terms

> *"1. 'A declaration that the Decision of the Respondent is unlawful, invalid, irregular, null and void and no effect.*
> *2. An order of Certiorari to remove into this court and quash the decision made by the Respondent on 3 February 2015.*
> *3. An order of Prohibition prohibiting the Respondent giving effect to its decision of 03 February 2015.*
> *4. Further or in the alternative, a declaration (in any event) that the decision of the Respondent is unreasonable.*
> *5. Costs*
> *6. ...."*

11. The Applicant seeks the above reliefs on following grounds:

"1. The Respondent failed to consider relevant factors by:
(a) failing to consider that section 187(2) of the Criminal Procedure Decree 2009 ("Decree") does not apply to disciplinary proceedings before the Tribunal as the time limitation of 12 months stated in that section only applies to offences in which the maximum punishment does not exceed imprisonment for 12 months; the only punishment that can be applied by the Tribunal are disciplinary penalties that do not involve the punishment of imprisonment.

(b) failing to consider that case law has established that even 5 years was not too long between the occurrence of a disciplinary incident and the disciplinary hearing.

2. The Respondent took into account irrelevant factors when it incorrectly made its decision based on the fact that:
(a) Section 187(a) of the Decree is appropriate in stopping the delay in filing of disciplinary charges against an employee who breaches the Code of Conduct.

(b) The Tribunal considered the submission of the Interested Party in stating that section 262 of the Employment Relations Promulgation ("Promulgation") outlines the timeframe for instituting proceedings for offences when the public service is exempt from the provisions of the Promulgation by virtue of the Employment Relations (Amendment) Decree 21 of 2011.

(c) There were other disciplinary cases not related to the Applicant's case that were not attended to expeditiously and in the Tribunal's attempt to improve its efficiency, productivity, accountability and transparency, it has imposed the limitation of time.

3. The decision by the Respondent on 03 February 2015 ordering that the submissions of the Applicant on time limitation be dismissed and that the Applicant file fresh amended disciplinary charges within the time limitation imposed by the Tribunal is unreasonable and irrational as the time limitation of 12 months to file criminal charges outline in the Decree, which the Tribunal has mandated should apply to proceedings before it, applies to criminal proceedings whilst proceedings in the Tribunal are administrative in nature.

4. *The Respondent's decision is arbitrarily and improperly made as it:*

(a) failed to consider relevant factors in that the time limitation of 12 months in filing criminal charges outlined in the Decree which the Tribunal has mandated should apply to proceedings before it only applies to criminal proceedings whilst proceedings before the Tribunal are administrative in nature.

(b) Failing to consider that case law has established that even 5 years was not too long between the occurrence of a disciplinary incident and the disciplinary hearing.

(c) Considered the irrelevant factors that the time limitation of 12 months in filing criminal charges in the Decree is appropriate in stopping the delay in filing of disciplinary charges against a government employee, in considering the time limitation in the Promulgation when the Public Service is exempt from the provisions of the Promulgation and imposing the limitation of time to improve efficiency, productivity, accountability and transparency.

(d) Irrationally ordered that the submissions of the Applicant on time limitation be dismissed and that the Applicant file fresh amended disciplinary charges within the time limitation imposed by the Tribunal as the time limitation of 12 months to file criminal charges outlined in the Decree which the Tribunal has mandated should apply to proceedings before it applies to criminal proceedings whilst proceedings in the Tribunal are administrative in nature".

12. The clause 10 relating limitation of time of the Circular issued by the Chairman of the PSDT state as follows

'10.0 Limitation of Time

The Tribunal shall exercise its authority under Section 120(8) of the Constitution not to accept any matter/charge that is laid after 12 months when the matter/charge arose. Refer to Section 187(2) of the Criminal Procedure Decree.'

13. The Circular 2/2014 was issued on 30th April, 2014 and was issued to all "Permanent Secretaries and Heads of Department" and the subject was "Disciplinary Procedures".

This circular was never challenged in a judicial review, but now the application of 'Limitation' contained therein is challenged.

14. The reference to Section 187(2) does not limit the application to 'minor' criminal matters. It imposed generally to all the disciplinary matters.

15. The Section 187(2) of the Criminal Procedure Decree states as follow

> *'(2) No offence shall be triable by a Magistrates (sic) Court, unless the charge or complaint relating to it is laid within 12 months from the time when the matter of the charge or complaint arose.'*

16. The rationale of the Section 187(2) of Criminal Procedure Decree is that certain less serious or 'minor' offences cannot be charged after one year from the time when the matter or charge arose. So the said rationale can be applied to the 'Limitation' contained in the Circular. If the charges referred to are not criminal charges there should be a limitation and according to the Circular the same rationale for limitation contained in the Section 187(2) of the Criminal Procedure Decree is applied.

17. In ***Council of Civil Service Unions v Minister for the Civil Service*** [1985] AC 374 at 414, [1984] 3 All ER 935 at 953-4, HL, Lord Roskill said,[1]

> *'.....Thus far this evolution has established that executive action will be the subject of judicial review on three separate grounds. The first is where the authority concerned has been guilty of an error of law in its action, as for example purporting to exercise a power which in law it does not possess. The second is where it exercises a power in so unreasonable a manner that the exercise becomes open to review on what are called, in lawyers' shorthand, Wednesbury principles (see Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680, [1948] 1 KB 223). The third is where it has acted contrary to what are often called*

[1] this decision was applied in a recent case of ***R (on the application of Sandiford) v Secretary of State for Foreign and Commonwealth Affairs*** [2014] 4 All ER 843.

'principles of natural justice'. As to this last, the use of this phrase is no doubt hallowed by time and much judicial repetition, but it is a phrase often widely misunderstood and therefore as often misused. That phrase perhaps might now be allowed to find a permanent resting-place and be better replaced by speaking of a duty to act fairly. But that latter phrase must not in its turn be misunderstood or misused. It is not for the courts to determine whether a particular policy or particular decisions taken in fulfillment of that policy are fair. They are only concerned with the manner in which those decisions have been taken and the extent of the duty to act fairly will vary greatly from case to case as, indeed, the decided cases since 1950 consistently show. Many features will come into play including the nature of the decision and the relationship of those involved on either side before the decision was taken.'

18. At the hearing it was reiterated, that the Applicant is not challenging the Circular, but challenging the decision of the PSDT made on 3/2/2015. The said decision was based on the clause 10 of the Circular. From the above mentioned grounds for judicial review there is no allegation of lack of power of the PSDT to decide on limitation of disciplinary matters. There is no allegation of violation of principles of natural justice. So the ground for judicial review will confine to unreasonableness in the application of limitation of one year to non criminal matter, in terms of clause 10 of the Circular.

19. It should be borne in mind any disciplinary matter needs finality and whether to charge or not is a decision that needs to be taken with caution. The issue with the Interested Party related to absenteeism, which is far from being even considered as a 'criminal' matter that is covered under the Section 187(2) of the Criminal Procedure Decree. So when considering the application of the limitation for such a disciplinary offence it cannot be considered as serious as a criminal offence and it is not unreasonable to apply the limitation period of one year based on the rationale of the Section 187(2) of the Criminal Procedure Decree, in terms of the clause 10 of the Circular.

20. The Circular was issued to all the 'Permanent Secretaries and Heads of Department' and not being challenged in this Judicial Review. The clause 10 deals with 'Limitation 'and there is no distinction of criminal and non criminal matters, in the said clause that dealt

the issue of limitation. If the limitation was only for the 'minor' criminal matters it could have been stated directly.

21. What is needed is the interpretation of the said Clause 10 of the Circular and whether the PSDT had applied in wrongly in requesting the Applicant to amend the charges to confine to time limitation imposed in the Circular. In my judgment '*Refer to Section 187(2) of the Criminal Procedure Decree'* will not confine the 'Limitation' contained in the clause 10 only to petty criminal matters but the rationale contained in the said Section 187(2) needs to be utilized in the interpretation of the said clause relating to the limitation. The rationale is when the matter is not severe and trivial even a criminal offence must be charged within one year if not the alleged perpetrator is prejudiced hence no charge can be entertained. This can be so as to loss of memory of a petty incident and lack of interest on the party to preserve evidence in support of a possible plea for such things. So in my judgment the 'reference' to Section 187(2) of the Criminal Procedure Decree does not go to the extent of limiting the application of the said clause to 'minor' criminal matters, but rather should use the rationale in the said provision of law to disciplinary matters in general.

21. Even if I am wrong on the above, if the argument for the Applicant is taken there will be one year limitation for institution of disciplinary action only for the 'minor' criminal offences. So there will not be any limitation for charges relating to **non criminal** (eg **absenteeism,** or non compliance of code of conduct etc) as well as **severe criminal offences** (eg offence which attract a sentence **over one year of imprisonment** or fine over 10 penalty points). This would seem wholly unreasonable to categorize two completely different types of offences on the scale of graveness being categorized in the same manner as to the limitation. This would be unreasonable application of 'Limitation' relating to disciplinary matters.

CONCLUSION

22. The Applicant is not challenging the Circular. There is no unreasonableness in application of limitation contained in the clause 10 of the Circular to the charges filed against the Interested Party. The charges that were filed span a period of 8 years. It would not be reasonable for a person to ask for explanation of events that happened 8 years, when they are not even minor criminal matters covered in Section 187(2) of the Criminal Procedure Decree. The application for juridical review of the decision of the PSDT delivered on 3.2.2015 is struck off. Considering the circumstances of the case I would not award any costs.

FINAL ORDERS

a. The Application for Judicial Review dismissed and struck off.

b. No costs.

Dated at Suva this 23rd day of June, 2016

.....

Justice Deepthi Amaratunga
High Court, Suva