

IN THE HIGH COURT AT SUVA
CIVIL JURISDICTION

Judicial Review No. HBJ 06 of 2018

IN THE MATTER of an application by VENAISI ROKOVAU 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 the decision of the Public Service Disciplinary Tribunal dated 27th July 2018 relating for the time limitation in the institution of disciplinary charges.

BETWEEN : **THE STATE**

AND : **PUBLIC SERVICE DISCIPLINARY TRIBUNAL**

AND : **VENAISI ROKOVAU**

AND : **PERMANENT SECRETARY OF COMMUNICATIONS**

Coram : **The Hon. Mr Justice David Alfred**

Counsel : **Ms. O. Solimailagi for the Interested Party**

Date of Hearing : **23 October 2018**

Date of Decision : **26 October 2018**

RESPONDENT

APPLICANT

INTERESTED PARTY

JUDGMENT

1. This is the Applicant's Application for leave to apply for Judicial Review of the decision making process of the Respondent.
The Applicant appeared in person.

2. The Applicant seeks:
 - (1) An Order of Certiorari to remove the decision made by the Respondent on 27 July 2018 and for the same to be quashed.
 - (2) An Order of Mandamus directing the Respondent to uphold the provisions of Clause 10 of its Circular No 02 of 2014 issued on 30 April 2014 and to dismiss the disciplinary charges laid against the Applicant.
 - (3) Further or in the alternative a Declaration that (in any event) the decision of the Respondent is tainted with inconsistency, irrational, erroneous and unreasonable.
 - (4) Damages.

3. The grounds of the Application are as follows:
 - (a) The Respondent acted unfairly and unreasonably when it failed to uphold the provisions of the said Clause 10 that regulated a time limitation of 12 months for the institution of disciplinary action against public officers in the Civil Service.
 - (b) The Respondent exceeded its jurisdiction and abused its powers by providing its interpretation of section 120(8) and (14) of the Constitution which is inconsistent with its policy on the 12 months timeframe.
 - (c) The Respondent acted irrationally by providing an interpretation of the Constitution when it should have referred the question of law to the High Court for interpretation.
 - (d) The Respondent acted unreasonably and unfairly by not upholding and acting contrary to the time limitation of 12 months for the institution of disciplinary action.
 - (e) The decision of the Respondent to determine the disciplinary charges that were instituted after the 12 months timeframe is unlawful and inconsistent.
 - (f) The Respondent acted contrary to the legitimate expectation of the Applicant.

- (g) The irregular decision making process of the Respondent and its decision is susceptible to Judicial Review.
4. The Statement in Support of the Application repeats the reliefs sought and the grounds stated in the Application.
5. The Applicant in her affidavit in support deposes as follows:
- (i) She was employed in the Civil Service from 26 September 1988 and was suspended without pay with effect from 25 August 2015.
 - (ii) She was served with 3 disciplinary charges on 2 March 2017 which related to conduct that purportedly occurred on 15 May 2015.
 - (iii) On 13 June 2018 when she appeared before the Respondent, her Counsel raised the issue that the charges were laid against her outside of the 12 months time frame laid down in the said Circular which the Respondent has the statutory powers to issue.
 - (iv) On 27 July 2018 the Respondent delivered its ruling wherein it decided the issue did not have any merit and dismissed her application.
 - (v) The Respondent acted in breach of her legitimate expectation.
 - (vi) The Respondent exceeded its powers by accepting the disciplinary charges that were time barred by the Circular.
6. On 24 September 2018 I allowed the application of the Permanent Secretary for Communications to be joined as an interested party in these proceedings.
7. The Interested Party in his Notice of Opposition states as follows:
- (1) The Applicant does not have an arguable case for leave to apply for judicial review.
 - (2) The Respondent's decision to overrule the Applicant's preliminary objection was made within its powers to regulate its procedure under section 120(9) and (14) of the Constitution, whereas section 15(3) relates to the right of a person charged and a party to a civil dispute to have their case determined within a reasonable time.

- (3) The Circular does not create a legitimate expectation for the Applicant and does not negate the Respondent's powers and mandatory function to hear and determine disciplinary actions under section 120 of the Constitution.
8. The Applicant in her affidavit in response deposed as follows:
- (1) The Respondent acted irrationally and unreasonably by reneging upon its own guideline for the timely filing of disciplinary charges as provided in the Circular.
 - (2) The Permanent Secretary failed to exercise his authority to institute the disciplinary action within the time frame of 1 year.
 - (3) There is an important issue to be determined by the Court which is related to the validity and legality of the issuance of the Circular.
9. The hearing commenced with the Applicant submitting that the Circular was followed but the Tribunal decided that the Circular is not Law. She contested the Tribunal's decision.
10. Ms Solimailagi (State Counsel) then submitted. The Circular is a Tribunal Circular and not a Civil Service circular. She said it was not out of time for all the charges because the Tribunal Circular is not a written law as far as Section 120(8) of the Constitution is concerned. The Tribunal cannot make its own written laws regarding its functions. The Tribunal cannot restrain the period within which it will entertain a charge. The Applicant cannot say the Tribunal is interpreting a written Law.
11. The Applicant in her reply said the Circular was made with the approval of Parliament vide s.120(8) of the Constitution. She said the Circular is a written Law.
12. At the conclusion of the arguments I said I would take time for consideration as this was a case where the State Counsel was arguing against the Circular and the Applicant was arguing equally strenuously for the Circular. Consequently I am of opinion that the legal

issue before me shall be resolved expeditiously by a consideration of the meaning of the relevant words and terms with which this Court is concerned – which are expressed in the Queen’s English

13. The pivotal issue is the interpretation of Clause 10 of the Public Service Disciplinary Tribunal Circular No.2/2014, which reads 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 2009”.
14. The question then is what is the authority of the Tribunal under s.120 of the Constitution. (In this judgment all references to sections are to those in the Constitution).
15. I start with the very words of the Circular that “the Tribunal shall exercise its authority under s.120(8) of the Constitution not to accept any matter/charge laid after 12 months when the matter/charge arose”. Section 120(8) says “The authority.....of the Tribunal shall be prescribed by written law.....”
16. What is a written law as far as s.120(8) is concerned? To answer this I shall consider the following definitions appended below”.
17. The Constitution in Chapter 12 Part B – Interpretation states a “written law” means an Act, Decree, Promulgation and subordinate law made under those Acts, Decrees or Promulgations”.

18. It also states that a "subordinate law" means any instrument made in exercise of a power to make the instrument conferred by an Act, and includes regulations, rules, orders, by-laws or declarations". I note it does not include a circular.
19. Stroud's Judicial Dictionary of Words And Phrases Sixth Edition states "An instrument is a writing and generally imports a document of a formal legal kind".
20. The Interpretation Act 1967 states "written law means all Acts....and all subsidiary legislation". Subsidiary legislation means any legislative provision.....made in exercise of any power in that behalf conferred by any written law....."
21. Finally I come to the definition of a circular which is a Government circular here. The Oxford Dictionary of Law defines "government circulars" as "Documents circulated by government departments on behalf of ministers, setting out policies, principles, and practices for the exercise of ministerial powers delegated to public officials. In some instances circulars provide mere administrative guidelines and have no legal effect".
22. At the end of the day and after considering the various definitions I am constrained to opine that the Tribunal has not been given any authority by any written law not to accept, i.e. to reject any matter/charge laid more than 12 months after that matter/charge arose.
23. In the result I have come to the conclusion that the time limitation in the Circular has no legal effect.
24. Consequently I must find and I so hold that the Tribunal was correct when it held that the Applicant's objection was without merit and overruled it.
25. In the result the Applicant has failed to show she has an arguable case to be granted leave to apply for judicial review of the Respondent's decision. Her application for

Judicial Review filed on 3 August 2018 is hereby dismissed but in the circumstances of this matter, I shall order each party to bear their own costs.

Delivered at Suva this 26th day of October 2018.



David Alfred

JUDGE

High Court of Fiji