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.

STATE **v** **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 S. Ali for the Applicant

Mr P. Tawake for Interested Party

REPRESENTATIVE: Mr S. Sharma for the Respondent

DATE OF JUDGMENT: **24 May 2019**

JUDGMENT

INTRODUCTION

1. Pursuant to Leave granted on 29 April 2016, Applicant by Notice of Motion dated and filed on 5 May 2016, seeks following reliefs:-

   "(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 the 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."

   (**"the Application"**)

2. On 3 June 2016, being returnable date of the Application, Mr S. Sharma, represented the Respondent and informed Court that Respondent will provide Copy Record of the proceedings and will not make any submission when the Application was adjourned to 8 July 2016.

3. On 8 July 2016, the Interested Party did not appear and as such the Application was adjourned to 12 August 2016, with direction for service of Notice of Adjourned Hearing.

4. The Application was next called on 19 August 2016, when Applicant and Interested Party were directed to file Submissions and Application was adjourned to 27 October 2016, for hearing.

5. Applicant and Interested Party filed Submissions.

6. Following Affidavits were relied 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"**).

BACKGROUND FACTS

7. Interested Party was employed in the Government Printing Department as a Clerical Officer, with effect from 5 November 2002.

8. Interested Party was transferred to Ministry of Works and Transport under same terms and conditions, with effect from 3 March 2009.

9. By internal memorandum dated 29 March 2010, 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).

10. 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).

11. 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).

12. 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.

13. 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).

14. The Interested Party was interviewed by the Department (Annexure "FK23" of Kean's 1st Affidavit).

15. 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 1st Affidavit).

16. There is no evidence of any response from the Interested Party to the charges served on her.

17. The Applicant 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.

18. The Respondent heard the charges on or about 10 July 2013, and delivered its Ruling on 30 July 2013.

19. Ruling was submitted to PSC, who then returned the file to the Respondent to determine disciplinary action to be taken against the Interested Party.

20. On 6 November 2013, the Respondent invited the Applicant and the Interested Party to mitigate on 28 November 2013.

21. 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).

22. 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."*

23. Order 53 Rules 1 and 2 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."***

24. The reliefs sought by the Applicant and grounds for seeking such reliefs is stated in the Application for Judicial Review as follows:-

> *"2. The grounds upon which the Applicant is seeking relief against the within named Respondent are:-*
>
> *(a) The Respondent failed to consider relevant factors by failing to consider that Litiana Diani had been given sixteen warnings and two counselling sessions over a period of three years in an attempt by her Employer to improve her conduct which proved futile.*

(b) The Respondent took into account irrelevant factors when it incorrectly made its decision based on the fact that this disciplinary action was the first for Litiana Diani to appear before the Respondent rather than consider the fact that Litiana Diani was a frequent offender who breached the Public Service Code of Conduct over a period of three years before the matter was brought before the Respondent.

(c) The decision by the Respondent directing the Applicant to reinstate Litiana Diani is unreasonable and irrational as the Tribunal determined that a decision to terminate Litiana Diani despite numerous warnings and counselling sessions for late arrival and absence without leave would tantamount to severe and disproportionate treatment being in violation of the Constitutional right to be free from cruel and degrading treatment.

(d) The Respondent's decision is arbitrarily and improperly made as it:

(i) Took into account irrelevant factors that this was Litiana Diani's first hearing before the Tribunal therefore she was a 'first offender';

(ii) Failed to consider relevant factors that Litiana Diani was a frequent offender who was warned sixteen times over a period of three years;

(iii) Irrationally applied a violation of a constitutional right to be free from cruel and degrading treatment in a disciplinary matter failing to give proper weight to the frequency and gravity of the offences by Litiana Diani as a Public Service employee."

25. The gist of 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.

26. Before proceeding to consider the grounds this Court feels it is appropriate to take note of the fact that the Respondent found that the Applicant proved the charges laid against the Interested Party when at page 259 of Copy Record the Respondent stated as follows:-

> **"The Tribunal has found that the Prosecution has proved its case on the balance of probabilities on all the four charges."**

27. No review is sought of above decision and only decision that is subject to Judicial Review is decision made on 28 November 2013, and reproduced at paragraph 22 of this Judgment.

28. In **Associated Provision Picture Houses Limited v. Wednesburry Corporation** [1947] 2 ALL ER 680 - Lord Green at pages 682 - 683 stated as follows:-

> ***"It is frequently used as a general description of the things that must be done. For instance, a person entrusted with a discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the matter he has to consider. If he does not obey those rules, he may truly be said, and often is said to be 'acting unreasonably'. Similarly, you may have something so absurd that no sensible person could ever dream that it lay within the powers of the authority..."***

29. In **R. v Hillingdon London Borough Council** [1986] AC 484 at 518 Court stated as follows:-

> ***"The ground upon which the courts will review the exercise of an administrative discretion is abuse of power - e.g. bad faith, a mistake in construing the limits of the power, a procedural irregularity (for example breach of natural justice), or unreasonableness in the Wednesbury sense - unreasonableness***

verging on absurdity... Where the exercise or non-exercise of a fact is left to the judgment and discretion of a public body and the fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the discretion of the fact to the public body to whom Parliament has entrusted the decision-making power save in the case where it is obvious that the public body, consciously or unconsciously, are acting perversely."

30. The Applicant submits 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."*

31. 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."*

32. 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."*

33. It is therefore, not disputed that Respondent had all documents mentioned in paragraph 42 of Kean's 1st Affidavit.

34. This Court notes that the Respondent had copies of notices given to the Interested Party by the Applicant and also had the evidence that the Interested Party was afforded counselling.

35. It is obvious that Respondent took the conduct of the Interested Party which resulted in notice being issued to Interested Party and Interested

Party being counselled in finding that the **"Prosecution proved its case on balance of probabilities on all four charges"**.

36. This Court accepts Applicant's Submission that the Respondent failed to take into account that Interested Party was a habitual absentee or late comer to work who has been counselled by Applicant through his Office on various occasions.

37. The fact that Interested Party was habitual late comer to work or absent from work without prior approval of her senior, the Interested Party being counselled on two occasions and Interested Party continued arriving late for work and being absent from work without prior approval were relevant factors which Respondent should have taken into account when making decision on 28 November 2013.

38. Applicant submits that, the Respondent took into consideration irrelevant factor in that the Interested Party was a first offender because Interested Party has appeared before the Respondent only once.

39. It appears that Respondent made his decision as if the Respondent was dealing with a criminal case against the Interested Party rather than a disciplinary proceeding.

40. In some criminal cases, Court considers the fact the accused is a first or repeated offender when passing sentence.

41. In this instance, the Applicant took relevant action after the Interested Party breached the code of Conduct for being a late comer to work and being absent from work without approval on several occasions.

42. Hence, the fact when the Interested Party was a first offender was an irrelevant fact or which Respondent should not have taken into consideration.

43. 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.

44. The Respondent held that Applicant's action was cruel and derogatory as against the Interested Party.

45. Having found that Prosecution proved all four charges, this Court fails to see how Respondent could hold that Applicant's action was cruel and derogatory in breach of s11 of the Constitution.

46. No evidence was put before the Respondent that Applicant's action was cruel and/or derogatory.

47. This Court also fails to understand how giving several notice and Interested Party being counselled on two occasions can amount to cruel and derogatory.

48. After making the finding, that Interested Party breached Public Service Code of Conduct as charged, the Respondent after hearing mitigation was supposed to deliver a rationale and reasonable decision on sentence.

49. This Court holds the Applicant's Submission that the Respondent's decision was improper, irrational and unreasonable, by taking into consideration that Interested Party was a first offender on the face of various warning letters and two counselling sessions; and by holding that Applicant breached s11 of the Constitution.

50. This Court notes that the Interested party submitted and relied on **State v. Public Service Appeals Board, Ex-parte Torowale** [2008] FJHC 405; HBJ0028.2008 (17 December 2008) and **Tagicakibau v. PSC** [2001] FJHC 12.

51. **Tagicakibau's** case deals with alleged breaches of provision of Prisons Act and Prisons Service Regulations and as such is not relevant to issue in this proceedings.

52. In **Torowale's** case the Court dismissed Employee's argument that warnings given to her prior to final warning letter should not have been taken into account for disciplinary proceedings against the employee.

53. The Court at paragraphs 15 and 16 of the Judgment stated as follows:-

"[15] The object of warning letters is to caution a person or try to get a person to reform. Its purpose is not investigatory and punitive like that of disciplinary proceedings. In *Tagicakibau v. PSC* (2001) FJHC 12 Justice Fatiaki in comparing punishment after investigation with warning letters remarked obiter that: *"This latter prohibition would be rendered meaningless if the officer's conviction could subsequently be resurrected for the purpose of undermining his efficiency... The same cannot be said however, of warning letters and counselling sessions or other non-disciplinary measures".* The prohibition he was considering there was officer being punished twice for the same offence.

[16] The Court of Appeal upheld the above reasoning and went further to state that in deciding whether an officer had ceased to be efficient, his whole employment history may be taken into account. Discharge of an inefficient officer is different from imposing a penalty: *PSC and Attorney General v. Rusiate Tagicakibau* - ABU 24 of 2001."

54. In view of nature of proceedings this Court is of the view that each party bear their own cost of this proceeding.

55. This Court holds that the Respondent should have accepted Applicant's recommendation to terminate employment of the Interested Party.

Orders

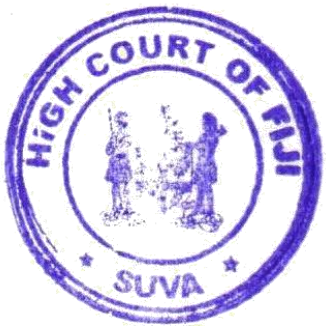
56. I make following Orders:-

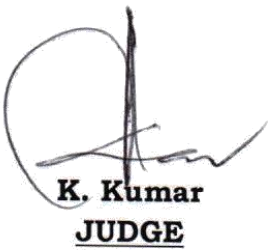
(i) Decision of the Public Service Appeal Tribunal, the Respondent delivered on 28 November 2013, in respect to Interested Party is set aside and quashed;

(ii) Interested Party's employment with Ministry of Works, Transport and Public Utilities is deemed to be terminated with effect from 28 November 2013;

(iii) Applicant do pay the Interested Party all wages and benefits lawfully due to her during the period she was suspended from work until 28 November 2013;

(iv) Each party bear their own costs of this proceedings.





K. Kumar
JUDGE

At Suva
24 May 2019

Office of the Solicitor-General for the Applicant

Respondent in Person

Legal Aid Commission for Interested Party