

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No.: HBJ 07 of 2019

IN THE MATTER of an application by IVA TAGIVETAUA VOLAVOLA POWELL and FIJIAN TEACHERS ASSOCIATION for Judicial Review under Order 53 of the High Court Rules 1988

-and-

IN THE MATTER of Decision purported to be made by the ACTING PERMANENT SECRETARY EDUCATION and/or HEAD OF HUMAN RESOURCES OF THE MINISTRY OF EDUCATION and/or MINISTER FOR EDUCATION, and/or MINISTRY OF EDUCATION on or about 14th December 2018.

BETWEEN :

1. IVA TAGIVETAUA VOLAVOLA POWELL
2. FIJIAN TEACHERS ASSOCIATION

APPLICANTS

AND :

1. PERMANENT SECRETARY EDUCATION
2. HEAD OF HUMAN RESOURCES OF THE MINISTRY OF EDUCATION
3. MINISTER FOR EDUCATION
4. MINISTRY OF EDUCATION

RESPONDENTS

Counsel : Applicants: Mr Valenitabua S.
Respondents: Ms. Toki S and Chand S.
Date of Hearing : 3.7.2019
Date of Judgment : 17.9.2019

Catch Words

Public campaign- Social Media Platform- Postings, Sharing, comments, 'like' - no evidence of security features activated in facebook account Self evident postings of campaign – breach of code of conduct- arguable case for permission to Judicial Review- inquiry through email-PSC Circular 36/2014- Fijian Civil Service Guide Lines on being a Public Officer and a Candidate for Election and Campaigning for a Political Party or a Candidate(4.4.2018)-Public Service Act 1999-Constitution of the Republic of Fiji.

Cases Referred in Judgment

Pritchard v. Van Nes, 2016 BCSC 686.

Jack Monroe V Katie Hopkins [2017] EWHC 433 (QB).

R v Inland Revenue Commissioners Ex. Pt National Federation of Self employed and Small Business Ltd [1982] A.C. 617.

Sharma v Brown Antone [2007] 1 WLR 780.

R(FZ) v Croydon London Borough Council [2011] EWC A Civ 59.

JUDGMENT

INTRODUCTION

1. Applicants seek leave to apply for Judicial Review against the Respondents regarding termination of employment of first Applicant, and second Applicant is an association which first applicant is a member. First Applicant was a teacher employed by Ministry of Education. The employment contract was governed *inter alia* by Civil Service Act 1999, PSC Circular 36/2014 and *Fijian Civil Service Guide Lines for candidacy and political campaign (Guideline of 4.4.2018)*. First Applicant had admitted, posting on social media platform Facebook, specific screen shots relating to General Elections held in 2018. Admitted postings on social media platform Facebook, are self-evident that they promote a political party and or candidacy of a political party. This was in violation of guide lines issued which declared campaigning on behalf of a political party or candidate as a breach of the code of conduct. Applicants state that this 'Guideline on being a Public Officer and Candidate for Election and Campaigning for a Political Party or Candidate' (Guideline of 4.4.2018) was not followed, when termination of employment of first Applicant. There is no reference to any specific provision that was not followed, in the termination of employment by first Respondent, so allegation is baseless. In the second Applicant's letter to Acting Permanent Secretary, appealing against termination, it was stated that most of the said Facebook posts were '**just shared and meant for amusement with friends**'. This is not accepted as a form of defence on posting on social media platforms including Facebook in regard to defamation in Canadian Supreme Court Case *Pritchard v. Van Nes*, 2016 BCSC 686 and UK Queen's Bench Division determination in *Jack Monroe V Katie Hopkins* [2017] EWHC 433 (QB). In terms of

employment contract second Applicant was obliged to comply *inter alia* with Civil Service Guidelines issued by Public Service Commission (PSC) and breach of such obligation may result in dismissal after reasonable inquiries by Permanent Secretary. **PSC Circular No 36/2014 under 3.4 forbids** 'campaigning or participation in any political party 'and '*any attempt to publicly further the activities or aspirations of a political party*' or a *candidate*. Admitted postings on social media platform violated said prohibition. There is no illegality as to the method used as reasonable inquiries were made through emails and first Applicant had admitted the postings on Facebook and those are self-evident as they campaign on political party and or a candidate of General Election held in 2018. The purpose of having a oral hearing before granting permission for judicial review is to eliminate cases that do not disclose arguable case, thus eliminating any misconceived applications for judicial review.

FACTS

2. First Applicant was employed as a teacher and was under a contract of employment with Ministry of Education. The employment contract was for a fixed term of 5 years from 10.08.2017.
3. Second Applicant is an association where first Applicant is a member. It had made an appeal on behalf of first Applicant after termination of her employment.
4. On 29.11.2018 fist Applicant received an email from fist Respondent seeking clarification as to the specific "screen shots" taken from a Facebook account.
5. First Applicant without any reservation admitted that those seven screen shots and had 'apologized' and had 'recommitted' through an email sent to fist Respondent on 7.12.2018.
6. Apart from those specific screen shots there were other postings on facebook account of the Plaintiff and all seven postings relating to election are annexed to the affidavit in support marked as 'E'.
7. On 14.12.2018 Acting Permanent Secretary to the Ministry of Education has terminated employment of fist Applicant and the said letter stated following reasons for the termination.
 - a. *Sharing defamatory content against senior official of the day on social media Facebook during election campaign period.*
 - b. *Breach of guide line on the involvement and conduct of civil servant leading to election, during the election and immediate post-election period, and or breach of Code of Conduct and terms of Employment Contract.*

8. Second Applicant, on behalf of first Applicant had made an appeal against the said termination of first Applicant to first Respondent. *Inter alia* said letter of the first Respondent stated:

"Therefore, Ms. Powell admitted to sharing these posts and comments contrary to the above Acts. Further, Ms. Powell failed to behave in a way that upholds the Public Service Values and compromised the integrity and good reputation of the Civil Service and this Ministry. She also failed to adhere to the PSC Circularly 36/2014 on the conduct of civil Servant.

Having considered the evidence against her, the clear code of conduct breach and the severity of the case, I made the decision to terminate her current contract with the concurrence of the Honourable Minister.

Due to the severity of the issue and that this is an approach consistent with other Ministries who have acted in a similar way to other civil servants who have breached the Public Service Values and the law, we are not in a position to consider your request."

9. The Applicants filed summons on 31.5.2019 are seeking leave for judicial review of the decision of 14.12.2018 terminating first Applicant's contract of employment on following grounds:

(a) Ultra Vires

(i) *The 1st Respondent exceeded or did not properly exercise his constitutional jurisdiction by terminating the 1st Applicant's employment without due process being followed.*

(ii) *The 1st Respondent exceeded or did not properly exercise his jurisdiction in law by terminating the employment of the 1st Applicant for defamation without proving the same under the law of tort.*

The 1st Respondent exceeded or did not properly exercise his jurisdiction by terminating the 1st Applicant's employment without affording her the right to be heard in a court of law on claims of defamation.

(b) Errors of Law on the face of the Record

(i) *The Respondent made errors of law in not proving defamation first before terminating the employment of the 1st Applicant.*

(ii) *The Respondents made errors of the law in early terminating the 1st Applicant's employment under a fixed contract of employment contrary to the termination clause within the 1st Applicant's 5 year fixed employment contract from 1st August 2017 to 1st August 2022.*

- (iii) *The Respondents made errors of law in terminating the 1st Applicant's employment without affording her natural justice to be heard in a court of law in defence to claims of defamation.*

(v) Procedural Impropriety

- (i) *The Respondents acted in breach of procedure by terminating the 1st Applicant's employment without first proving defamation allegations in a court of law on the balance of probabilities.*
- (ii) *The Respondents acted in breach of procedure by terminating the 1st Applicant's employment without affording her natural justice to be heard in a court of law in defence to claims of defamation.*

(d) Bias

- (i) *They acted unreasonably and/or irrationally and/or arbitrarily and/or in a biased manner in purporting to terminate the 1st Applicant's employment on the ground of defamation without proving the same in a court of law.*

(f) Legitimate Expectation

- (i) *The Respondents have also acted in breach of the legitimate expectations of the 1st Applicant in failing to give the 1st Applicant a fair hearing before purporting to terminate her employment.*
- (ii) *The Respondent s have also acted in breach of the legitimate expectations of the 1st Applicant in terminating her employment without affording her natural justice to be heard in a court of law in defence to claims of defamation.*
- (iii) *The Respondents have also acted in breach of the legitimate expectations of the 1st Applicant that her contract as a secondary school teacher will run for the next 5 years.*
- (iv) *The Respondents have also acted in breach of the legitimate expectations of the 1st Applicant that she will earn her salary between \$22,528 and \$36,103.75."*

ANALYSIS

10. First Applicant was employed as a teacher and Employment Contract was for five year term commencing from 13.8.2017. Said contract inter alia obliged fist applicant to;

"Comply with and is subject to civil service guidelines as issued by the Public Service Commission, the General Orders, Government policies, departmental

instructions and the laws of the Republic of Fiji as consolidated, amended, re-enacted or replaced from time to time."

11. It is admitted fact that first Applicant was maintaining a Facebook Account. On the said account there were postings canvassing a political party as well as candidates and or attempt to, publicly further activities or aspirations of a candidate/Political Party. The postings are annexed to the affidavit in support. These postings are self-evident as they depict names and numbers on ballot papers and one posting had a photo of ballot paper with a circle around a number and said posting state to vote for that candidate. (see Annexed 'E' to affidavit in support) It was a posting on 29th October, at 10.55. It was not a shared post by first Applicant and some of the postings that were promoting and canvassing a political party and or a candidate were shared postings of the postings done by others.
12. Apart from the said postings contained in annexed 'L', first Applicant also had postings contained in annexed 'D' which again solicited certain numbers, including the number which was indicated in the photo of the ballot paper and the name of the candidate which was contained in annexed 'D'. There were other words and there were 43 others who had 'like' the said posting made by the first Applicant and there were two who had already shared the said posting by 27th October 2.05 pm. It is known fact that General Elections in accordance with Electoral Act 2014 was held on 14.11.2018¹.
13. There was another posting of first Applicant promoting same number which had attracted 37 'like's and one comment by 31 October at 9.07 pm.
14. All these postings were made before General Elections and they remained in the facebook account for viewing of general public before the election. There was no evidence of any privacy settings activated by the first applicant that restricted viewing them. There was no such statements in the affidavit in support and all indicate that postings were consumption of the public at large.
15. PSC Circular No 36/2014 dated 1.8.2014 stated inter alia

'3.4. Campaigning or participation in any political activity by a civil servant is forbidden. Civil Servants must not attempt to publicly further the activities or aspirations of a political party, or an election candidate. (emphasis added)
16. Affidavit in opposition contained the abovementioned PSC Circular No 36/2014 and no affidavit in reply was filed and at the hearing it was admitted that said circular applied to all Civil Servants including first Applicant at the relevant time.

¹ Final Report of Supervisor of Elections @ website of Fijian Election Office (17.9.2019)<https://www.feo.org.fj/final-report-by-the-supervisor-of-the-general-elections/>

17. Since the postings on social media platform Facebook were admitted, one need not labour to find that first applicant was publicly canvassing a political candidate and also party that represent said candidate whose number repeatedly appear and in the two postings in annexed 'D' and also in other postings and also shared content in annexed 'E'.
18. With the advent of social media and internet election campaigns can be conducted very successfully and cost-effectively through social media platforms such as Facebook. They are public and dissemination of the information is fast and more effective. In Pritchard v. Van Nes, 2016 BCSC 686 held (Per Saunders J)

"In my view, social media platforms and applications, Facebook in particular, are so ubiquitous that the court is able to take judicial notice of some aspects of their nature and operation.

[81] *First, it is uncontroversial that the distribution of information – comments, photographs, videos, links to items of interest – amongst users is fundamental to the use of a social media platform such as Facebook.*

[82] *Second, Facebook in particular facilitates such distribution through its structure or architecture. An individual user's posts to their own page are automatically shared with "friends" who are linked to the user's page. As "friends" react by commenting, the "friends'" comments may be spread automatically to "friends of friends". Such comments are solicited implicitly through the medium's tools that allow "Comment" on a post and "Reply" to a comment (not to mention soliciting endorsement through use of the "Like" button). Further distribution may take place through the "Share" function. This is intended only as a generic description; no detailed evidence was presented as to the specific features in operation on Facebook at the time of this incident. Nevertheless, it appears from the evidence that these basic features all played a role in the dissemination of Ms. Van Nes' defamatory remarks.*

[83] *In my view the nature of Facebook as a social media platform and its structure mean that anyone posting remarks to a page must appreciate that some degree of dissemination at least, and possibly widespread dissemination, may follow. This is particularly true in the case of the defendant, who had no privacy settings in place and who had more than 2,000 "friends". The defendant must be taken to have implicitly authorized the republication of her posts. There is evidence from which widespread dissemination of the defamation through republication may be inferred."*

19. First Respondent had inquired from first Applicant about the postings on her facebook account and after confirmation of the postings had issued a letter terminating her employment.
20. Employment Contract entered between first Applicant on 10.8.2017 under heading "Dismissal for misconduct or breach of any terms of the contract" states;

"The officer may be summarily dismissed under this contract if after reasonable inquiries the Permanent Secretary is satisfied that the officer is guilty of misconduct or a breach under this contract. Upon such dismissal, all rights and privileges accrued to the Office under this contract will be forfeited with the exception of the rights and privileges established under General Orders". (emphasis added)

21. The 'Guide line on being Public officer and Candidates for Election and Campaigning for a Political Party or a Candidate' dated 4.4.2018, annexed to the affidavit in support under heading "campaigning for a Political Party or a Candidate" states
"Where a civil servant is seen to be actively campaigning on behalf of a political party or a candidate, whether they are a declared candidate or not, this will be seen as a breach of the code of conduct."
22. From the admissions of the postings, it is self-evident that first applicant had actively campaigned for a political party and or a candidate of the General Election and or attempted to further aspirations of a Political Party/candidate which was a breach of code of conduct.
23. First Applicant was issued with a letter terminating her employment with effect from 14.12.2018, for 'sharing defamation (sic) comments against the senior government official of the day on social media Facebook during the election campaign period'. It further stated
"The Government has a guideline on the involvement and conduct of civil servant leading up to the Election, on the election day and immediate post-election period and your actions are a breach of the Code of Conduct and the terms of your employment contract"
24. So, there were reasons for termination given in the said letter of termination. One reason was defamation, which cannot be determined summarily upon admission of the said postings, the next was breach of Code of Conduct and lastly breach of employment contract. First Applicant had breached Code of Conduct and or terms of the employment contract by postings that campaign for a candidate and number allocated to that candidate and the party belonging to said candidate.
25. Campaigning for a candidate publicly using social media platform Facebook is a breach of the code of conduct in terms of Guideline on being Public Officer and Candidates for Election and Campaigning for a Political Party or a Candidate' as it is an active form of campaign on behalf of that candidate.
26. There was no further inquiry needed since the content of the postings are self evident. Annexed 'D' contained two postings of the first Applicant which was forbidden in terms of 3.4 of PSC Circular 36/2014.

27. Civil Servants are required to be impartial in terms of Section 123 of the Constitution and apolitical in terms of values under Civil Service Act, 1999. The background for abovementioned guidelines issued on 4.4.2018 reiterated said values. First Applicant had publicly posted content that campaign for a candidate, and these were shared and 'like' by others.
28. There is no express provision that was violated by first respondent, in the statement filed in terms of Order 53 rule 3(2)(a) of the High Court Rules 1988 though it stated procedural impropriety. Once the said postings were admitted by first Applicant termination was effected. There was no need of further inquiry due to nature of the content and nature of misconduct.
29. First Respondent had sought Minister's concurrence where the relevant postings of the first Applicant were annexed and inter alia stated:
- "5. Ms. Powell had failed to behave in a way that uphold the public service values and the integrity and good reputation of the public service.*
- 6. She had also failed to adhere to the PSC circular 36/2014 on the conduct of civil servant where civil servant should not indulge in active political or party activities".*
30. The Minister of Education had endorsed the termination on 10.12.2018 and accordingly first Applicant was terminated from 14.12.2018 by a letter.
31. Though leave to seek judicial review can be granted without an oral hearing in terms of Order 53 rule 3(5)(b) of High Court Rules, the refusal of leave is only after an oral hearing. The purpose of having two stage process is to eliminate applications which are misconceived, frivolous, trivial, hopeless, vexatious and cases that do not show 'an arguable case'. This is to allow administrative bodies not to be in suspense, regarding decisions made.
32. In R v. Inland Revenue Commissioners Ex. Pt National Federation of Self employed and Small Business Ltd [1982] A.C. 617 (HL.) at 642(Per Lord Diplock

"Rule 3(5) specifically requires the court to consider at this stage whether "it considers that the applicant has a sufficient interest in the matter to which the application relates". So this is a "threshold" question in the sense that the court must direct its mind to it and form a prima facie view about it upon the material that is available at the first stage. The prima facie view so formed, if favourable to the applicant, may alter on further consideration in the light of further evidence that may be before the court at the second stage, the hearing of the application for judicial review itself. The need for leave to start proceedings for remedies in public law is not new. It applied previously to applications for

prerogative orders, though not to civil actions for injunctions or declarations. Its purpose is to prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived" (emphasis added)

33. If the available evidence as the stage of consideration of permission for judicial review is all the evidence that was considered by decision making body and the applicant is unable to show any ground for judicial review the permission is refused. In my mind judicial discretion is used, in granting or refusal for permission to file judicial review action. It depends on many factors.
34. First Respondent had not exceeded power in the termination of first Applicant from service. Though defamation is alleged, the conduct of Applicant from her admission of the said postings on the Facebook and they were seen and shared by others which was self-evident was breach of code of conduct and PSC Circular 36/2014.
35. There was no violation Section 17 of Constitution of Republic of Fiji. as '*freedom of speech and publication*' is not an unfettered freedom and it can be subject to limitation contained in Section 17(3) of the Constitution of the Republic of Fiji. PSC Circular 36/2014 and *Fijian Civil Service Guide Lines on being a Public Officer and a Candidate for Election and Campaigning for a Political Party or a Candidate (Guide line of 4.4.2018)* was issued in terms of the said restriction to maintain civil service apolitical.
36. Permission for judicial review will only be granted when the court is satisfied that there is an arguable case that warrants further hearing subject to other requirements such as delay, and other procedural requirements contained in Order 53 of High Court Rule 1988. (See *Sharma v Brown Antone* [2007] 1 WLR 780, *R(FZ) v Croydon London Borough Council* [2011]EWCA Civ 59.
37. Arguable case cannot be defined and it depends of the facts and circumstances and there is judicial discretion applied for the grant of permission to file judicial review. On the facts of this case first Respondent had not violated any procedure. Though statement filed stated that first respondent had not granted an opportunity to be heard, there was an inquiry through email, as to the postings and there is no denial of all the postings on first Applicant's social media platform Facebook account. Before taking action, first Applicant had even apologized and expressed 'recommitment'. So sufficient inquiry was made in terms of employment contract. There was no need to prove the content of the postings were defamatory, since all sort of public campaigning as well as even an attempt for such campaign, is forbidden in terms of PSC Circular 66/2014 (vide 3.4). The fact

that termination letter of 14.12.2018 indicated the posting as defamatory does not change the character of said postings and violation done by first Applicant. The said letter also stated that first Applicant had violated the code of conduct. This is sufficient for termination considering the seriousness of the violation. There was no evidence of bias and legitimate expectancy cannot arise when a 'forbidden' act in terms of PSC Circular 36/2014 is admitted. In terms of employment contract legitimate expectation for employment is only when such terms of employment are not violated. At the hearing there were no errors on the face of the record pointed out that warrant further hearing of this matter. The termination of employment was done with necessary concurrence of Minister and there was no *ultra vires* pointed at the hearing.

CONCLUSION

38. At this stage of seeking permission to file judicial review, there are all the evidence available regarding termination of first Applicant, which is subject matter. In the affidavit in support Applicant had submitted postings of her account in social media platform Facebook. These postings canvassed a candidate and or a political party about one month prior to General Elections held 2018. They had also remained on the social media platform facebook even after election. There is no evidence of such content being removed even after inquiry by first Respondent. There was no need to prove defamation or derogatory content was posted or shared for breach of PSC Circular 35/1014 and or 'Guide line on being Public officer and Candidates for Election and Campaigning for a Political Party or a Candidate' dated 4.4.2018. What was needed for breach of Code of Conduct was satisfied with admitted content on her account. The content of the said postings were also shared and liked by others and there was no evidence of any privacy settings that prevented public access. There was no need to have further inquiry once the content and postings were admitted in a social media platform such as facebook. First Applicant had breached the code of conduct required of a Civil Servant as there was public campaign for a candidate and or attempt to further of General Election 2018. There is no arguable case for the Applicants for judicial review regarding the termination of employment of first Applicant. Application for leave is refused. Considering the circumstances of the case no costs awarded.

FINAL ORDERS

- a. Application for judicial review refused.
- b. No costs

Dated at Suva this 17th day of September, 2019.



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Justice Deepthi Amaratunga
High Court, Suva