

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Judicial Review No. **HBJ 15 of 2019**

BETWEEN : **THE STATE**

AND : **THE PERMANENT SECRETARY FOR EDUCATION
HERITAGE AND ARTS**

RESPONDENT

AND : **DOLENDRA NARAYAN**

APPLICANT

BEFORE : **M. Javed Mansoor, J**

COUNSEL : **Mr. D. Nair with Mr. M. Lomaloma for the Respondent**
: **Ms. O. Solimailagi with Ms. G. Naigulevu for the Applicant**

Date of Hearing : **10 July 2020**

Date of Decision : **20 September 2023**

DECISION

JUDICIAL REVIEW
Order 53 High Court Rules

Leave – Dismissal from employment – Availability of the remedy –

The following cases are referred to in this decision:

- a) *Palani v Fiji Electricity Authority* [1997] FJCA 21; ABU 0028.96 (18 July 1997)
 - b) *R v East Berkshire Health Authority, ex parte Walsh* [1984] 3 All ER 425
 - c) *Permanent Secretary for Education, Heritage and Arts v Kumar* [2016] FJHC 346; HBJ 15.2015 (29 April 2016)
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1. The applicant was employed by the respondent from 22 January 1990 as a school teacher. His services were terminated by letter dated 18 October 2019 while he was on a renewed contract from 13 August 2017. His dismissal was preceded by an investigation into an allegation that he inflicted corporal punishment on a class 4 student.
2. On 10 January 2020, the applicant filed an application for leave to apply for judicial review. The applicant sought *inter alia* an order of certiorari to quash the respondent's decision to terminate his employment, an order for mandamus directing the respondent to reinstate him without the loss of benefits and entitlements, declaratory relief and damages.
3. The applicant stated that the respondent contravened the principles of natural justice, that the process by which his employment was terminated lacked transparency and impartiality, that the respondent acted in excess of jurisdiction by failing to comply with civil service disciplinary procedures, that the decision to terminate his employment was harsh and disproportionate and that he was not accorded procedural fairness. The applicant said that in his 30 years of service for the respondent, this was the first occasion he was accused of misconduct. He stated that the investigation report was not disclosed to him, and he was not served with any charges.
4. The respondent opposed the leave application stating that there was no arguable case. The respondent stated that an internal investigation was carried out in

accordance with the civil service discipline guideline following a complaint received by the ministry of education. The investigation revealed that the applicant had inflicted corporal punishment on a student in the course of his employment. The investigation report had stated that the applicant tapped the shoulder of the student victim for misbehaving in class.

5. At the hearing into the leave application, the applicant submitted that he was employed by the government and his employment was subject to civil service guidelines issued by the Public Service Commission. His retirement was in accordance with regulation 14 (1) of the Civil Service Regulations. His employment was terminated in terms of section 127 (7) of the 2013 Constitution for breach of the civil service code of conduct and the Civil Service Act.
6. The applicant submitted that the source of the complaint was not disclosed, and no particulars were given of the nature of corporal punishment alleged to have been inflicted. He stated that regulations 22 (2) & (3) of the Public Service Regulations warranted obligatory compliance of natural justice and procedural fairness. Section 120 (9) of the Constitution required the Public Service Disciplinary Tribunal to determine a disciplinary matter concerning the applicant.
7. The respondent submitted that the applicant's employment was summarily terminated in terms of the authority vested in the respondent by sections 127 (7) and 163 (5) (b) of the constitution, and based on the applicant's contract of employment in accordance with section 33 of the Employment Relations Act 2007. The decision was made, the respondent submitted, on the finding that the applicant inflicted corporal punishment on a school student. The respondent submitted that the ministry of education, heritage and arts has zero tolerance for corporal punishment.
8. The main question before court is whether the dismissal of the applicant's employment is amenable to judicial review.
9. The respondent submitted that the employment relationship between the applicant and the respondent is private in nature and does not involve a public law element. The respondent referred to the Fiji Court of Appeal decision in *Palani*

*v Fiji Electricity Authority*¹. The Court of Appeal held that judicial review would not be available in a master servant relationship based on a contract of employment. The court stated:

“In our view none of these matters injects the necessary element of public law into the master and servant relationship. Walsh’s case makes it clear that the mere fact of Mr. Palani being employed by a public statutory authority is not sufficient”.

10. The Court of Appeal referred to the decision in *R v East Berkshire Health Authority, ex parte Walsh*² in which the English Court of Appeal stated:

“In all three cases there was a special statutory provision bearing directly on the right of a public authority to dismiss the plaintiff. In *Vine’s* case, the employment was under the statutory dock labour scheme and the issue concerned the statutory power to dismiss given by that scheme. In *Ridge v Baldwin* the power of dismissal was conferred by statute (s 191 (4) of the Municipal Corporations Act 1882). In *Malloch’s* case again it was statutory (s 3 of the Public Schools (Scotland) Teachers Act 1882). As Lord Wilberforce said, it is the existence of these statutory provisions which injects the element of public law necessary in this context to attract the remedies of administrative law. Employment by a public authority does not per se inject any element of public law....”

11. In *Permanent Secretary for Education, Heritage and Arts v Kumar*³, the applicant sought an order to quash the decision of the permanent secretary to terminate the applicant’s employment. The High Court stated:

“The fact that the Applicant was a public servant and her employer was a Government Ministry did not, *ipso facto*, convert an employee/ employer situation from a private law one to a public law situation where judicial review becomes available”.

12. In view of the foregoing, the court holds that the respondent’s decision to terminate the applicant’s employment is not amenable to judicial review. This is not to say that the court rejects the applicant’s version of events. The court will not

¹ [1997] FJCA 21; ABU 0028.96 (18 July 1997)

² [1984] 3 All ER 425

³ [2016] FJHC 346; HBJ 15.2015 (29 April 2016)

consider the merits of the applicant's complaint as the respondent's decision cannot be the subject of a judicial review.

13. There was an alternative remedy which the applicant could have pursued.
14. The definition of "employer" in section 4 of the Act includes the government, other government entities, a local authority and a statutory authority. The definition of "employer" in section 185 under, which is in part 19 under the heading, essential services and industries also includes the government, a statutory authority and a local authority.
15. There was no impediment to the applicant pursuing his claim as an employment grievance under the Act.
16. In these circumstances, the court declines the application for leave to apply for judicial review.

ORDER

- A. The application for leave to apply for judicial review is struck off.
- B. The parties will bear their respective costs.

Delivered at **Suva** on this **20th** day of **September, 2023**.



A handwritten signature in blue ink, appearing to read "M. Javed Mansoor".

M. Javed Mansoor
Judge