

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Judicial Review No. 08 of 2021

IN THE MATTER of an Application for leave to apply for Judicial Review pursuant to Order 53 Rule 3 (2) by VASITI TOGA (the Applicant)

AND

IN THE MATTER of LEGAL NOTICE NO.53 - HEALTH and SAFETY at WORK (GENERAL WORKPLACE CONDITIONS) (AMENDMENT) REGULATIONS 2021, SECTIONS 52B (1), (2), (3), (4) & (5), SECTIONS 52C (1), (2), (3) & (4), SECTIONS 52D (1), (2), (3) & (4), SECTIONS 52E (1), (2), (3), (4) & (5) & SECTIONS 52F (a) & (b) which came into effect on 08 July 2021 after being made into law by way of regulations by the MINISTER FOR EMPLOYMENT which mandates compulsory vaccination also known as the 'No Jab, No Job' policy directly impacts VASITI TOGA (the Applicant).

AND

IN THE MATTER of LEGAL NOTICE NO. 53 - HEALTH and SAFETY at WORK (GENERAL WORKPLACE CONDITIONS) (AMENDMENT) REGULATIONS 2021, SECTIONS 52B (1), (2), (3), (4) & (5), SECTIONS 52C (1), (2), (3) & (4), SECTIONS 52D (1), (2), (3) & (4), SECTIONS 52E (1), (2), (3), (4) & (5) & SECTIONS 52F (a) & (b) which came into effect on 08 July 2021 after being made into law by way of regulations by the MINISTER FOR EMPLOYMENT which mandates compulsory vaccination also known as the 'No Jab, No Job' policy which is in violation of SECTION 8 - RIGHT TO LIFE SECTIONS 11 (1) & 11 (3) -

FREEDOM FROM CRUEL & DEGRADING
TREATMENT, SECTIONS 22 (1), 22(2) &
22(3)(a) - FREEDOM OF RELIGION,
CONSCIENCE & BELIEF & SECTIONS 26(1),
26 (2), 26(3)(a) & (b) & 26(4) - RIGHT TO
EQUALITY & FREEDOM FROM
DISCRIMINATION of the FIJI
CONSTITUTION 2013.

BETWEEN: THE STATE

AND: (1) MINISTER FOR EMPLOYMENT

FIRST RESPONDENT

(2) PERMANENT SECRETARY FOR EMPLOYMENT

SECOND RESPONDENT

(3) ATTORNEY GENERAL OF FIJI

THIRD RESPONDENT

AND: VASITI TOGA

EX-PARTE APPLICANT

BEFORE: Hon. Mr. Justice Vishwa Datt Sharma

COUNSEL: No appearance of the Applicant

Ms. Fatima G. - for the 1st, 2nd and 3rd Respondents

DATE OF JUDGMENT: 25th January, 2024

JUDGMENT

[Leave to issue Judicial Review Order 53, Rule 3(2) of the High Court Rules 1988]

On the outset, it will be noted that neither the Applicant nor counsel representing the Applicant was present at the hearing. The Hearing proceeded in their absence.

INTRODUCTION

1. The Applicant, Vasiti Toga, sought for leave to apply for Judicial Review in respect of the Decision made on 10th June 2021 by the Acting Chief Executive Officer of Fiji Revenue and Customs Services [FRCS] vide circular no. 57 stating that since the vaccination is a requirement for FRCS, only those that are vaccinated will be considered for the **Renewal of the Contract**.
2. Further, vide Circular No. 59 issued by the Acting Chief Executive Officer of Fiji Revenue and Customs Services on 09th July 2021, following the Prime Ministers '**No Jab, No Job**' announcement that unvaccinated staff are to proceed on leave by 12th July 2021.
3. Staff who have not received the First Dose of the Covid-19 Vaccine on or before 1st August, 2021 will no longer be employed by Fiji Revenue and Customs Services.
4. Staff who have not received the second dose of the Covid-19 Vaccine before 01st November 2021, will no longer be employed by Fiji Revenue and Customs Services.
5. The Applicant relied on the following grounds:
That the regulation are:
 - (a) Unconstitutional and unlawful
 - (b) First Respondent acted ultra-vires in making the law
 - (c) Regulations are incompatible with the following Constitutional Provisions:
 - (i) Section 11(1) and (3)
 - (ii) Section 22(1), (2) (3)(a)
 - (iii) Section 26(1), (2), (3)(a) and (b), (4)
6. The Applicants Grievances can be ascertained from her affidavit as follows:
 - (a) She doesn't want to be vaccinated.
 - (b) She doesn't believe that the vaccines work.
 - (c) Since she has chosen not be vaccinated she has forfeited her employment with Fiji Revenue and Customs Services.

- (d) This is due to the effect of the Health and safety at Work (General Workplace) Regulations 2021.
- (e) She also says that her constitutional rights under the Bill of Rights have been breached.
- (f) Since the Regulations breached her Constitutional Rights it ought to be struck down.

PRINCIPLES GOVERNING LEAVE

7. Justice Scutt in *Lesili Tuiwawa v Pio Tikoduadua & Ors* HBJ No. 40 of 2008

- 2.1 (a) **Judicial Review:** As to judicial review itself, *Fiji Public Service Association v. Civil Aviation Authority of Fiji and Attorney General of Fiji and Airports Fiji Limited* (JR No. 015 of 1998L, 30 November 1998) set down the principles, based upon *O'Reilly v. Mackman* [1983] UKHL 1; [1983] 2 AC 237, where Lord Diplock widened Atkin, LJ's limitation in *Rex v. Electricity Commissioner; Ex parte London Electricity Joint Committee Company* [1920] 1 KB 171, whereby a prerogative writ could issue solely to 'those having the duty to act judicially': at 205
- 2.2 Contrary to that limitation, said Lord Diplock, wherever anybody of persons 'has authority conferred by legislation to make decisions' whether judicial, quasi-judicial or administrative, a court can make an order to quash that body's decision:
- for error of law in reaching it; or
 - for failure to act fairly towards the person to be adversely affected by the decision by failing to observe either one or other of the two fundamental rights accorded him by the rule of natural justice of fairness, viz -
 - to have afforded him a reasonable opportunity of learning what is alleged against him and of putting forward his own case in answer to it; and
 - to the absence of personal bias against him on the part of the person by whom the decision falls to be made: at 279.
- 2.3 As 'a most basic principle', he said, 'an application for judicial review must show on the evidence, that one or more of the common law or statutory rights or obligations of the applicant has been adversely affected by the decision complained against'.

DETERMINATION

8. Order 53, Rule 3 [Or.53 r.3] of the High Court rules 1988 makes its perfectly clear that no application for Judicial Review shall be made unless the Leave of the Court has first been obtained as the Fiji Court of Appeal has said:

'The Rule does not lay down any criteria upon which the Court must proceed, so on the face of the rule, the discretion of the Court is unfettered. That does not mean of course, that Court's discretions is wholly subjective. Surely, it must act in accordance with Judicial Principles and is subject on appeal to review, if it fails to observe them.' [**Harikisun Limited v Dip Singh & Ors & Director Town and County Planning and Suva City Council**, Civ. Appeal No. ABU 0019 of 1995s].

9. It is only on the hearing of the substantive application for review that Court can grant the relief sought. At the **Leave Stage**, as far as substantive **merits** are concerned, the court only indulges in a brief preliminary examination. Further, threshold is low. The **test is whether or not there is an arguable case to be resolved only by a full hearing of the application for the substantive Judicial Review accordingly.**
10. The whole purpose of requiring that leave should first be obtained to make the application for Judicial Review would be defeated if the Court were to go into the matter in any depth at that stage. If on a quick perusal of the material then available, the Court thinks that it discloses what might turn out to be an **arguable case in favour of granting** the relief claimed, it ought, in the exercise of a Judicial discretion, to give him leave to apply for that relief.
11. The question now arises is whether on the facts of this case and the circumstances which led to the introduction of the new law in place called the **'Health and Safety at work [General Workplace Conditions] (Amendment) Regulations 2021** dated 08th July 2021 which effectively mandated compulsory vaccination against Covid-19 and **'No Jab, No Job'** announcement warranted the grant of leave for Judicial Review should be granted or not.
12. On the perusal of the material available herein before me, this Court finds that the Applicant has disguised a Constitutional Redress application as opposed to Judicial Review for the obvious reasons best known to her.
13. A Judicial Review is a review of an administrative decision based on the procedures that are followed. In this case there is no evidence that the Regulations were not made. Lawfully, in particular the Health and Safety at Work (General Workplace Conditions) (Amendment) Regulations, 2021.

14. The Regulations apply to every workplace and worker in Fiji. It does not discriminate against workplaces or workers.
15. The Applicant has not provided any evidence that she is being deprived of her right to life nor anyone is forcing her to change or give up of her religious beliefs.
16. No one is forcing her to take Covid-19 Vaccines nor has she identified what type of degrading treatment she has suffered.
17. The law clearly allows for limitation of rights of individuals in order to make a workplace safe for all other workers. Workers must consider the rights of all other workers. If an express Law places a limitation on any Bill of Rights under the Constitution, it will not be deemed to be inconsistent with the Constitution.
18. In the current case, the purpose of the Health and Safety at Work Act is and has relevance which governs Health and Safety at the workplace and its objectives are set out clearly in the Act.
19. Both employers and workers have certain obligations under the Health and Safety Act. **'Every employer should ensure the health and safety at work of all his or her workers.'** Workers are also under an obligation. Every worker shall **at all times while at work, take all reasonable care.**
20. Covid-19 is a reality in Fiji. Many persons have been affected by this outbreak. Vaccinations are not only being administered in Fiji, it is being developed and administered in all the developed countries in the world.
21. The Regulation herein are not unlawful and/or unconstitutional. Neither are they ultra vires nor inconsistent with the Constitution.
22. The Applicant also seeks to obtain a prohibition to stop Vaccination altogether in Fiji. Many people in Fiji do not ascribe to the Applicant's personal opinions, so seeking such a general and blanket prohibition is rather misconceived and cannot be acceded to as sought for.
23. The Applicant specifically sought a writ of certiorari on the grounds that the Regulations are unlawful and unconstitutional, neither of these grounds have any merit whatsoever.
24. The discretion to grant and/or refuse **'Leave to apply for Judicial Review'** is with the High Court.
25. The Applicant's application is based on misconceived grounds. The relevant Health and Safety at Work Act fulfils the criteria of making a workplace safe and to make the workplace safe for all the workers, not one or two individuals only.

26. Bearing all above in mind, the application herein is clearly doomed to fail since the application is based on misconceived grounds.
27. Accordingly, the Applicant's application filed on 08th October 2021 seeking for the orders for certiorari, prohibition, declarations and stay are in its entirety dismissed.

COSTS

28. It is only just and fair that each party to the proceedings to bear their own costs of the application at the discretion of this Honourable Court.

ORDERS

- (i) The Applicant's Originating Notice of Motion together with the Affidavit of Vasiti Toga is in its entirety dismissed.
- (ii) Each party to the proceedings to bear their own costs at the discretion of this Honourable Court.
- (iii) File is Closed.

Dated at Suva this 25th day of January 2024.




VISHWA DATT SHARMA
JUDGE

cc: *Niudamu Lawyers, Main Street, Vaileka, Rakiraki
Attorney-General Chambers, Suva*