

THE STATE

v.

THE DIRECTOR OF PUBLIC PROSECUTIONS

ex parte

ANDIE MARIA AGNES DRIU

[HIGH COURT, 1998 (Lyons J) 9 October]

Revisional Jurisdiction

Judicial review- public service- leave to move for judicial review of departmental transfer. High Court Rules 1988 Order 53 rule 3.

The High Court explained why it refused leave to move for judicial review of the decision of a Departmental Head to transfer a member of her staff.

No case was cited.

Application for leave to move for judicial review in the High Court.

A. Patel for the Applicant

A.H.C.T. Gates with *C.B. Young* and *Dr. S. Shameem* for the Respondent

Lyons J:

Having on the 8th instant set aside leave previously granted I did, on the 9th hear, inter partes, a leave application. I refused to grant leave. Herewith are my written reasons.

The applicant was represented by Mr. Patel. Mr. Gates with Mr. Young and Dr. Shameem, represented the respondent.

The Solicitor-General (Mr. N. Nand) had what was termed a "watching brief". The Solicitor General was very persistent in this. No cogent reason was advanced for his wanting to watch. In fact on the 2nd of October the Solicitor General was refused leave. On the 8th he reappeared through different counsel and, despite the previous refusal, persisted. Only so as to save his counsel embarrassment was he allowed to stay. The Court was not assisted one bit by the Solicitor-General's presence.

This case has sparked some interest – and not at all for the purest interest of law. Television reporters have approached the Court for some "copy" to feed their captive audience. The Solicitor General wants to look in. In the proper exercise of his duties he should be representing the DPP. Correspondence on file indicates he has compromised that position.

The facts can be briefly dealt with.

The applicant is a reasonably experienced prosecutor. She was posted to Nadi

A some time back. She was unhappy at Nadi. Reasons concerning the inappropriateness of accommodation were advanced. Her performance also suffered. The respondent, as her Head of Department, became understandably displeased. A dispute arose.

For reasons which I suspect related more to interference by outsiders, the dispute blew out of control. The DPP put the applicant "on notice". Meetings followed.

B Emotions flowed. The dispute widened. The DPP concluded the dispute by posting the applicant to Labasa. The posting would be for at least 2 or 3 years. The applicant has absolutely no desire to go to Labasa. She has brought a motion for review of the D.P.P.'s decision. Her principal claim is that the D.P.P.'s actions were unreasonably motivated by disciplinary reasons, rather than by adoption of the proper procedure.

C Counsel have worked hard. A great deal of material is placed before me. Details submissions have been presented. Much can be gained from these submissions at least as to questions of law.

D As I remarked the counsel on the 8th, this is more a matter of "soul" than of law. The stony - faced response from the unemotive bar table convince me that they either thought I was talking about a type of fish (misspelt) or the gravelly tones of Wilson Pickett. The matter proceeded. I have read the submissions. I have heard the oral arguments. The Solicitor-General has watched.

E The claims, counter-claims, allegations and counter-allegations raise various concerns. At least so in the minds of the parties. Serious issues of credit worthiness are put forward. Both are implied to be untruthful. Both or either, are implied to be, hard-hearted, tyrannical, timid, incompetent. The list is as unflattering as it is endless.

F I have no mind for even entering into this area. It is sufficient to say that both the applicant and respondent are reputed to be honest, hard-working and courageous persons undertaking an extremely difficult job. They are both said to be doing their jobs with integrity and unblemished credit. They set a good example for this country by their efforts. Nothing in the material before would dissuade me from accepting that reputation of both parties.

G I do not intend to exercise my discretion and allow this matter to proceed further on to Judicial Review. The parties have crossed swords. There has been an obvious communication breakdown between two strong and competent people. It sometimes happens.

The respondent, as Head of the Department, has made her decision to transfer the applicant to Labasa. For whatever was, or is, the procedure or reason, the mind is set. Unless persuaded to consider reasons either than legal issues, she is most unlikely to change her mind.

The applicant has no desire to go to Labasa. She probably has no desire to even be in Nadi. Notwithstanding the accommodation (that is probably not the, real reason) even Nadi is not to her liking.

A

Even if Judicial Review were to be granted to the applicant, it will achieve nought. The D.P.P. will, perhaps understandably, simply go through the process again to reach, again, the point of transferring the applicant to Labasa. The applicant will again refuse. If she wanted to go to Labasa at all, she would – despite any procedural irregularities (if by in fact were present).

B

In the meantime the High Court in Labasa, in its Criminal Jurisdiction, waits.

The whole proceedings, at the end of the day, would be nothing more than a waste of time. The parties may have got some things off their chests. There may have been some blood-letting. But there would be no change in the eventual decision - that is unless different considerations were entertained.

C

In these circumstances, I decline to exercise my discretion and grant leave.

Having refused leave, I will make some observations.

This matter had little to do with Judicial Review. However in typical cold, stern faced fashion, the lawyers have done what they have been doing well for centuries: turning love into litigation.

D

Even in the confines of Judges Chambers in Lautoka, the distant signals of the “coconut wireless” can be heard. Yet the parties only hinted at the real and personal factors which influenced the applicant’s actions and then precipitated the respondents. The simple truth is (if I may resort to anecdotal evidence) - the applicant does not wish to be separated from the young man she loves. I may say that is entirely understandable. Nadi is even too far. Labasa is unthinkable. This is, at least so far as I can gather, no fleeting romance. It has been serious for some time. The full extent is known to both parties and their legal representatives. For some unknown reason (and I handed out hints), I was not told about it other than the occasional veiled suggestion. Are Judges seen as that impassive?

E

F

The respondent points out that it is not unusual for Government Departments in Fiji to transfer staff to outlying stations despite that such transfer may sever emotional affiliations. Apparently it is not uncommon in the Prosecution and Education Departments. Seemingly it is justified on a “toughen them up” policy. “Send them out on a lonely vigil but leave the loved ones behind - it will toughen them up!” Perhaps this is Pacific way - I doubt it. Perhaps it is a hangover from those who devised the plan to relieve the poverty of Ireland or India by “toughening up” the pitiful and deceived immigrant or indentured farmer with a long and often fatal sea voyage. Then to build distant colonies on the sweat of their brow and the bend of their back - whilst repatriating profits “home”.

G

A If indeed certain Government Departments do effect transfers of some staff inspite of emotional relationships (and it is not disputed) then such policy is entirely out of step with modern work place practices. The emotional well-being of staff is a paramount consideration. If they, or their respective partners, are unhappy in the heart work performance will inevitably suffer. Staff will leave because remaining will lead to bitterness and disappointment.

B I urge (and that is a "judicial urge") both the applicant and respondent to cast aside the law books and Public Service Commission rules; to disassociate themselves from the advisors, urgers and on-lookers and discuss candidly the true and emotional issues here and resolve them. It may even mean that consideration will have to be taken of such matters as love, affection and soul. By so doing it, arguably we may not be better lawyers but it will make us all better human beings. I do not think one needs a Tebbut Poll to indicate what the world needs more of.

C If, after doing that (and staying well away from court,) a suitable and binding resolution cannot be reached, the applicant has a choice to make. Go the pragmatic, career orientated and upwardly mobile path - or follow where the heart leads. And her decision, irrespective of what it is, should be respected.

D A court should not make the decision for either of these parties, let alone if presided over by a Judge who, being of Irish ancestors, still skips a heart beat at the lonesome sound of a Celtic fiddle. That personal decision - which faces all of us at one time or another - was made years ago.

E Two roads diverged in a yellow wood,
And sorry I could not travel both
And be one traveler, long I stood
And looked down one as far as I could
To where it bent in the undergrowth;

F Then took the other, as just as fair,
And having perhaps the better claim,
Because it was grassy and wanted wear;
Though as for that, the passing there
Had worn them really about the same,

G And both that morning equally lay
In leaves no step had trodden black.
Oh, I kept the first for another day!
Yet knowing how way leads on to way
I doubted if I should ever come back.

I shall be telling this with a sigh
Somewhere ages and ages hence:
Two roads diverged in a wood, and I-
I took the one less traveled by,

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And that has made all the difference.

“The Road Not Taken”
ROBERT FROST.

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(Leave refused – No Order as to costs.)

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