THE STATE

v

THE ATTORNEY-GENERAL OF FIJI

Ex parte
MIKAELE ROKOSUKA SULIANO

[HIGH COURT, 1998 (Pathik J) 22 May]

Revisional Jurisdiction

Judicial Review- practice and procedure- failure to file originating motion within the time limit following grant of leave- application to file out of time- principles applicable High Court Rules 1988; Order 53 rule 5 (1).

Following grant of leave to move for judicial review the applicant failed to file the motion within the time limit stipulated by the Rules. Application was made to file out of time. Refusing the application the High Court again emphasised the importance of judicial review proceedings being dealt with expeditiously and in compliance with the requirements of the Rules.

Cases cited:

Anuradha Charan v Public Service Commission & Ors, FCA Civ App. No. 2/92

Arbuthnot Latham Bank Ltd v. Trafalgar Holdings Ltd & Ors (The Times, 29.12.97)

Grovitt v Doctor (The Times April 25, 1977; [1977] 1 WLR 640)

R v Haringey London Borough Council ex p Haringey Letting Association (1993) COD 489

R v Institute of Chartered Accountants in England and Wales ex parte Andreou (1996) Adm. L.R. 557

Regalbourne Limited v East Lindsey District Council (1994) Admin. L.R 102

Shore Buses Limited & Ors v The Minister for Labour & Industrial Relations – (1996) 42 FLR 236

Smith v. Secretary of State for the Environment (1987) The Times, July 6

State v Director of Town & Country Planning, Suva City Council & Harikisun Ltd ex parte Dip Singh & two others, J R Action No. 20/94

State v. Transport Control Board, ex parte Shore Buses Limited and Ors, Judicial Review No. 10/92

Interlocutory application in the High Court.

S. Matawalu for the Applicant
S. Kumar for the Respondent

Pathik J:

By summons filed in this Court on 23 February 1998, Mikaele Rokosuka Suliano (the Applicant) is applying for leave to file Notice of Motion for judicial review out of time after leave was granted him on 20 June 1997.

It is on the chronology of events that my decision will be based. I therefore very briefly set out the relevant dates when documents were filed giving rise to this application.

By motion dated 17 March 1997 and filed on 9 April 1997 supported by an affidavit the Applicant applied for leave to move for Judicial Review under Order 53 Rule 3(2) of the decision of the Public Service Commission (the "Commission") made on 27 January 1997 terminating the applicant's employment, on the ground that it was in breach of the principles of natural justice.

The Application was served on the Respondent on 23 May 1997 and Affidavit of Service of same was filed on 2 June 1997. Leave to apply for Judicial Review was granted by me on 20 June 1997. An Affidavit in Opposition was filed by the Respondent on 13 August 1997.

Then on 18 August 1997 the Applicant filed Notice of Motion for Judicial Review under Or 53 r5(4) whereupon as directed by me, the Court Registry informed Counsel for the Applicant on 20 August 1997 that this Motion is out of time and leave of Court is necessary before further proceedings are allowed.

A summons was filed on 5 December 1997 some three and half months after said notification seeking leave to file Motion out of time but without a supporting affidavit. Then two and half months later an affidavit sworn by the applicant on 18 February 1998 was filed on 23 February 1998 setting out the reasons for delay in filing Notice of Motion further to leave granted herein.

On 27 February 1998 the Respondent filed a Summons to dismiss the Judicial Review Application for failure to prosecute proceedings with due despatch under Or 28 r11(1) and Or 52 r5(4) and under inherent jurisdiction of this Court.

Both counsel appeared before me on the hearing of the two Summonses and made their oral submissions to which I have given careful consideration.

The issue

The issue before me is whether I should grant the Application to file motion out of time.

About the Applicant

Certain facts relating to the Applicant are important to bear in mind. Very briefly, on 19 September 1995 the Commission appointed the Applicant a

temporary relieving Clerical Officer in the Ministry of Education, Women, Culture, Science and Technology at the Queen Victoria School. On 14 January 1997 when he was preparing the banking he found the sum of $175.40 missing whereupon the Bursar told him to pay which he did, he says, under threat. He denied stealing or using the said sum. He was sent on leave for two weeks and on his return on 4 February 1997 he was told that his employment was terminated. He complains that he has "not been given a fair hearing before the termination of my employment and in doing so the Public Service Commission is in breach of the principles of natural justice and fairness".

The Respondent filed an Affidavit in opposition on 13 August 1997 in which it stated that it was after thorough investigation in accordance with the Rules and Regulations that the Applicant who was temporarily appointed relieving clerical officer and whose extended term was to expire on 20.3.97, was dismissed from employment.

Consideration of the issue

The relevant provisions of Order 53 which concerns this application provides as follows:-

> "5. - (1) When leave has been granted to make an application for judicial review, the application shall be made either by originating motion or by originating summons.
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> (2) .....
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> (3) Unless the judge granting leave has otherwise directed, there must be at least ten days between the service of the notice of motion or summons and the day named therein for the hearing.
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> (4) A motion must be entered for hearing within 14 days after the grant of leave. (underlining mine for emphasis)
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> (5) .....
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> (6) ....."

It is quite obvious from the facts outlined hereabove that the Applicant and his Counsel were oblivious of the time limit imposed on an Applicant under the abovementioned Rule. They were not concerned with the delay in filing the necessary Motion within the time limit stipulated in the Rule. If the Applicant was ignorant of the time factor, his counsel was not. Even if he was, and he does not say he was, it would not have helped him as held in Andreou (below). The explanation given by the Applicant and his counsel for the situation which has arisen in this case is totally unacceptable and is rejected outright as devoid of any merits.

Both the Applicant and counsel should not disregard the importance of time

limits. Dealing with this aspect of the matter Lord Woolf, the Master of the Rolls in Arbuthnot Latham Bank Ltd v. Trafalgar Holdings Ltd & Others (The Times, Law Report 29.12.97 at p.40) on importance of observing time limits said: A

> "Litigants and their legal advisers had therefore to recognise that in the future any delay which occurred would be assessed not only from the point of view of the prejudice caused to the particular litigants whose case it was, but also in relation to other litigants and the prejudice which was caused to the due administration of justice. B
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> The existing rules contained time limits which were designed to achieve the disposal of litigation within a reasonable time scale. Those rules should be observed."

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He goes on to state:

> "It was already recognised by Grovitt v Doctor (The Times April 25, 1977; [1977] 1 WLR 640) that to continue litigation with no intention to bring it to a conclusion could amount to an abuse of process.
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> Ready recognition that wholesale failure as such to comply with the rules justified in action being struck out, as long as it was fair to do so, would save much time and expense relating to questions of prejudice, and allow the striking out of actions whether or not the limitation period had expired."

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Apart from what I have said above regarding compliance with time limits, the case which fits like a glove to the facts of this case is R v Institute of Chartered Accountants in England and Wales ex parte Andreou (Adm. Law Reports March 19, 1996 p 557).

In Andreou the facts were almost on all fours with this case when an identical application was made and Popplewell J refused the application and on appeal the Court of Appeal held: F

> "(1) The purpose of the procedure governing applications for judicial review is to provide a simplified and expeditious means of resolving disputes arising in the field of public law.
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> (2) This purpose would be frustrated if the relatively leisurely and casual approach to time-limits which characterizes civil litigation in the field of private law were to be adopted in the field of public law.
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> (3) Therefore, notwithstanding that the error had been entirely that of the applicant's lawyers, (a) Popplewell, J had been right

> to dismiss the application for an extension of time within which to begin the substantive application for judicial review; and (b) the application for leave to appeal against that decision should be dismissed".

Certain passages from the judgment of Lord Justice Henry in Andreou at p559 are well worth keeping in mind in dealing with the provisions regarding the requirement under Or.53 r.5(4).

The "effect of granting leave brought into play" the Ord.53 r.5(4) and its effect is stated as follows (quoting from the *Annual Practice* at p.686, 53/1 - 14/36):

> "Having obtained leave to move for judicial review (whether from the QBD or the CA) the next stage is for the applicant to institute a substantive application for judicial review. To institute such a substantive application the applicant must within 14 days of the date of the grant of leave
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> ...
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> (ii) enter the motion (or summons) for hearing, by lodging with the Crown Office an affidavit of service and a copy of the motion (or summons)."

In his judgment Henry L.J talks of the meaning and import behind Ord.53 r.5(4) (our Rule) which he says is expressed in "mandatory terms" and not a mere matter of "technical matter of rules" as the Applicant in this case says in his Affidavit.

Henry L.J at p560 said:

> "The power to extend the Ord.53, r.5(5) requirement for the entry of the motion for hearing, which is expressed in mandatory terms - "A motion must be entered for hearing within 14 days after the grant of leave" - is to be found in Ord.3, r.5 of the Rules of the Supreme Court, the note to which contains this passage:
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> > "The provision of a chronological list of events leading to the delay, which omits any explanation of the delay, will not justify an extension of time; Ord.3, r.5 is not to be used merely as an `escape route' where practitioners have not been prompt dealing with cases (Smith v. Secretary of State for the Environment (1987) The Times, July 6, C.A.)".

The fact that there was no fault on the part of the Applicant, as the explanation for the delay, did not provide any acceptable reason for extending time (Andreou (supra)).

The following passage from Henry L.J's judgment (at p562-563) hits the nail on the head and brings to the fore the importance of time-limits in public law vis-a-vis private law:

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> "Public law deals with the identification and redress of public wrongs generally in disputes between the citizen and the State or its institutions. It provides under Ord.53 a simplified and expeditious procedure which is essential to enable the Crown Office List fulfilling its purpose, while recognizing both the general importance of the issues at stake and the large numbers often potentially affected by them, and the necessity for an early resolution of them. If "normal" private law delays the private law's relaxed attitude to rules and time-limits creep into the Crown Office List, then the delays in that list will build to the point that it can no longer properly perform the important public duty entrusted to it. Public law litigation cannot be conducted at the leisurely pace too often accepted in private law disputes. As has been pointed out in relation to the Woolf interim report on "*Access to Justice*", what is wrong in private law is often not so much the time-limits for individual steps laid down, but the fact that they are routinely not enforced. This case may be an example of just such a bad habit. It would be clear to any lawyer that there must be a time-limit for service of the notice of motion for which leave had been given, and if time-limits in private law were routinely in force, then the next step for any lawyer would inevitably have been to look up that time-limit."

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Henry L.J goes on to say at p563 that:

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> "..... it is clear from the authorities that you cannot simply read the principle set out in Costellow into a judicial review context. Sir Thomas Bingham, MR, who was presiding over the Court in Costellow made it clear" in Regalbourne case (below).

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This is what Sir Thomas Bingham, MR in Regalbourne Limited v East Lindsey District Council (1994) Admin. L.R 102 had to say and it is worthy of note:

> "I cannot of course speak for the other members of the court, but I can speak for myself when I say that I did not have in mind, or regard my judgment [in Costellow] as applicable to, an application for leave to appeal out of time, let alone an application for extension of time to appeal against the decision of a statutory tribunal in the public law context. I do not accept that the same principles apply in all those situations.
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> In this case the appellant company seek to challenge the decision of a statutory tribunal. They did not comply with a clear and

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short time-limit. In this context the reasonable requirements of public administration have a significance which is absent in ordinary *inter partes* litigation. By contrast, prejudice may assume a rather smaller significance. But most importantly, there is in this context a different statutory framework and the court must do its best to give effect to the intention of Parliament in the particular context before it."

There are other authorities in which the matter of extension of time was considered (Scott J in State v. Transport Control Board, Ex parte Shore Buses Limited and Ors, Judicial Review No. 10/92 - unreported judgment of 8.9.92; Shore Buses Limited & Ors v The Minister for Labour & Industrial Relations – (1996) 42 FLR 236; Anuradha Charan v Public Service Commission & Ors, FCA Civ App. No. 2/92 - judgment of 19.11.93 and Byrne J in State v Director of Town & Country Planning, Suva City Council & Harikisun Limited Ex parte Dip Singh & two others, J R Action No. 20/94). In R v Haringey London Borough Council ex p Haringey Letting Association [(1993) COD 489, Current Law Digest, December 1994 p5] extension of time for service of notice of motion was refused. There the applicants were given leave to apply for judicial review, but took no action for 14 months. They then applied for extension of time in which to lodge a notice of action.

For the above reasons, in the light of the authorities the application which was made too late is refused and is dismissed with $100.00 costs to the Respondent.

(Application dismissed.)