FIJIAN TEACHERS ASSOCIATION and Anor v PUBLIC SERVICE COMMISSION and Anor (HBJ3J of 2007S)

HIGH COURT — CIVIL JURISDICTION

JITOKO J

20 December 2007

Administrative law — judicial review — application to remove Respondents' decision to lower compulsory retirement age of civil servants from 60 to 55 years — whether Respondents have lawful authority to make decision — whether Respondents have misdirected themselves and erred in law in reducing compulsory retirement age for civil servants and government wage earners — whether Respondents failed and/or neglected to disclose or provide for decision to lower retirement age — whether first Defendant abused its discretion and acted unreasonably and/or arbitrarily by taking into consideration irrelevant matters — decision to lower retirement age properly belonged to the first Defendant — decision did not meet threshold requirement of what was reasonable and justifiable in a democratic society — decision breached s 38 of the Constitution — Constitution (Amendment) Act 1997 s 38(2) — Crown Proceedings Act (Cap 24) — Education Act (Cap 267) — Public Service (General) (Amendment) Regulations 2001 (LN 55/2001) — Public Service (General) (Retirement Age — Amendment) Regulations 2007 (LN 36/2007) — Trade Dispute Act s 3.

The Respondents issued a decision dated 9 March 2007 purporting to lower the compulsory retirement age of civil servants from 60 to 55 years. The Applicants claimed that the Respondents did not have the lawful authority to lower the compulsory retirement age to 55 since the Cabinet was not constituted in accordance with the Constitution (Amendment) Act 1997. In response, the Respondents' counsel submitted that the decision was rendered in accordance with Public Service (General) (Retirement Age — Amendment) Regulations 2007, as an exercise of the Public Service Commission's (PSC) powers to make regulations under s 15(1) of the Public Service Act 1999 (the 1999 Act). The Applicants alleged that the decision of the Respondents was incompatible with Ch 4 of the Constitution (Bill of Rights) and specifically s 38 on equality before the law. The Respondents' counsel argued that s 38 failed under Ch 4, which deals with individual rights of ordinary citizens. The Applicants sought judicial review and an order of certiorari to remove the Respondents' decision of 9 March 2007 and quash the decision.

Held — (1) The powers given by the Constitution to the first Respondent (R1) to make regulations was set out under s 15(1) of the 1999 Act. R1's regulatory-making powers resulted in the gazettal of the Public Service (General) (Retirement Age — Amendment) Regulations 2007. The decision to lower the retirement age properly belonged to R1. It was not necessary for the Prime Minister to put his signature of approval on the regulation. It was enough that the preamble said that the approval had been obtained. The court concluded that the lowering of compulsory retiring age by the 2007 Regulation was the exercise of powers by R1 prescribed to it by the Constitution and the 1999 Act.

(2) The court found that the application of the exception to equality as to age provided for in s 38(7)(b) of the Constitution could not be sustained. The objectives of the policy decision did not meet the threshold requirement of what was reasonable and justifiable in a democratic society. The policy may be said to promote the creation of employment and reduce some government costs but it is neither proportionate nor rationally connected to the objectives to be accomplished. The decision was therefore in breach of s 38 of the Constitution.

Application granted.

Cases referred to

Council of Civil Service Unions v Minister of Civil Services [1985] AC 374; [1984] 3 All ER 935; *R v Edwards Books & Art Ltd* (1986) 35 ULR (4th) 1; [1986] 2 SCR 713, applied.

Fiji Public Service Commission v Public Service Commission Award No 23/1995; *McKinney v University of Guelph* (1990) 76 DLR (4th); [1990] 3 SCR 229; *Pacific Transport Co Ltd v Mohammed Jalil Khan and Ors* FCA CA No 21/1996; *Proceedings Commissioner, Fiji Human Rights Commission v Suva City Council* HBC No 3/2004; *R v Monopolies and Mergers Commission; Ex parte Elders IXL Ltd* [1987] 1 All ER 451; *R v Foreign Secretary; Ex parte Everett* [1989] QB 811; *Bribe Commissioner v Pedrick Ranasinghe* [1954] UKPC 1, cited.

Annetts v McCann (1990) 170 CLR 596; 97 ALR 177; 21 ALD 651; *Olive Patricia Dickason v Governors of University of Alberta and Anor* [1992] 2 SCR 1103; *Re Westminster Count Council* [1986] AC 688; *R v Criminal Injuries Compensation Board; Ex parte Lain* [1967] 2 QB 864; [1967] 2 All ER 770, considered.

Raikadroka for the first Applicant

H. Nagin for the second Applicant

Rakuita and *N. Karan* for the first and second Respondents

Jitoko J. This is a claim for judicial review by the Applicants against the decision of the Respondents of 9 March 2007 purporting to lower the compulsory retirement age of civil servants from 60 to 55 years. The first Applicant is a trade union duly registered under the Trade Union Act (the Act) representing principally Fijian teachers from all teaching institutions of approximately 4000 membership, majority of whom are public officers appointed to teach under the provisions of the Education Act (Cap 267). The second Applicant is also a trade union also registered under the Act, and is the largest of all the trade unions of civil servants. The first Respondent is the employer of civil servants on behalf of the government. The second Respondent is sued in a representative capacity in accordance with the Crown Proceedings Act (Cap 24).

Background

There are around 25–35,000 employees of the Fiji Government. The exact number has not properly been verified. These include both established staff and wage earners. In so far as the established staff or public officers are concerned, their terms and conditions of employment are primarily governed by the general orders (GO) which, upon it being registered with the Ministry of Labour and Industrial Relations on 25 July 1973, became legally the master collective agreement (MCA) between the employees and the Public Service Commission (PSC) GO 102 states that general orders "prescribe the terms and conditions of services of Public Officers and certain procedures to be followed dealing with staffing and other matters in the Public Service". It adds that the GO should be read with other relevant laws, including the Constitution, Public Service Regulations and PSC delegation of powers. GO 105 states that the GO may be supplemented or amended from time to time.

The vast majority of government employees belong to a trade union or another reflecting sectoral interests and commonality of purpose. The Fiji Public Service Association (FPSA) represents mostly civil servants employed in government business. Fiji Nurses Association (FNA) represents 1419 civil servants. The Fiji Teachers Union (FTU) is representative union of mainly teachers of Indian ethnic

origin. These three Unions belong to the Confederation of Public Sector Unions (CPSU), an umbrella union organisation. Then there is the second umbrella organisation known simply as the Fiji Public Sector Unions (FPSU), made up of the Fijian Teachers Association (FTA) representing the majority of ethnic Fijians in that profession; the Viti National Union of Taukei Workers (VNUTU), the counterpart of FPSA; and the Public Employees Union (PEU) the representative of "unestablished" sector of government workers.

The compulsory retirement from government services is set out under 6.0223 which in turn is aligned to the Pension Act 1993. It is agreed by all the parties that the compulsory retirement age, before 9 March 2007, was 60, by virtue of the Public Service (General) (Amendment) Regulations 2001 (LN55 of 2001). It is also agreed that the Commission purported to change the compulsory retirement age to 55 in its Public Service (General) (Retirement Age — Amendment) Regulations 2007 (LN 36/2007). In addition the Regulation sets out what it terms a "transitional" provision which is intended to "phase-in", its implementation with minimum disruption to the public service. Regulation 3 states:

> (a) an officer who will turn 60 years from the commencement of these Regulations to 31 December 2007 shall retire on the date he or she attains 60 years of age;
> (b) an officer who will turn 58 or 59 years on or before 31 December 2007 shall retire on 31 December 2007;
> (c) an officer who will turn 55, 56, or 57 years on or before 31 December 2007 shall retire on 31 December 2008; and
> (d) these Regulations shall come into force and effect from 1 January 2009.

On 15 March 2007, the first Applicant filed its application of claim. It was later joined by the second Applicant. The issue of compulsory retirement comprised one in a bucket of issues that the first Applicant had, on 7 March 2007, referred to the Permanent Secretary of Labour, as a trade dispute under s 3 of the Trade Dispute Act. It subsequently withdrew it in lieu of the judicial review application. At the hearing of leave on 7 August, the court in ex tempore decision granted leave to the Applicants and a stay.

Reliefs sought

First both the Applicants seek the order of certiorari to remove the Commission's decision of 9 March into this court and the said decision be quashed. In addition, the first Applicant sought the following:

> (b) *A DECLARATION* that the Respondents' did not have the legitimate and/or lawful authority to reduce the compulsory retirement age via the promulgation of the Public Service (General) (Retirement Age Amendment) Regulations 2007 which amended regulation 14(1) of the Public Service (General) Regulations 1999 and thus such Regulation is void ab initio;
> (c) *A DECLARATION* that the Respondents' policy of reducing the compulsory retirement age from 60 to 55 years for both civil servants and government wage earners is ultra vires the provisions of section 38(2) of the Constitution;
> (d) *A DECLARATION* that the Respondents' policy of reducing the compulsory retirement age from 60 to 55 years for both civil servants and government wage earners without giving any reasons for doing so is not reasonable and justifiable in a free and democratic society like the Republic of the Fiji Islands.
> (e) For an *ORDER FOR MANDAMUS* directing the Respondents to reinstate the compulsory retirement age that stood at 60 years.

The second Applicant on the other hand sought the following two declarations:

(b) *A DECLARATION* (in any event) that the Public Service Commission had abused its discretion and/or acted arbitrary and/or unreasonably and/or acted in breach of the Second Applicant's legitimate expectations and/or exceeded its jurisdiction and/or made errors of law in purporting to reduce the retirement age from 60 to 55.

(c) *A DECLARATION* (in any event) that the Public Service Commission's decision dated 9th March 2007 is unlawful, invalid, void and of no effect.

Grounds for relief

For the first Applicant, it relied on the following:

(a) Cabinet vide Cabinet Decision 62/2007 resulting in the promulgation of the Public Service (General) Retirement Age Amendment) Regulations 2007 did not have the lawful authority to make such a decision that led to the Regulation being made as it was not constituted according to the Constitution (Amendment) Act 1997;

(b) The Respondents have misdirected themselves and erred in law when reducing the compulsory retirement age from 60 to 55 years for both civil servants and government wage earners as such policy is ultra vires the provisions of section 38(2) of the Constitution (Amendment) Act 1997;

(c) The Applicants had a legitimate expectation of being consulted on the reduction of the compulsory retirement age as it would affect the rights and livelihood of its members;

(d) The Respondents' have failed and/or neglected to disclose or provide any reasons vide PSC Circular No 8/2007 as to why they have decided to reduce the compulsory retirement age from 60 to 55 years and as such the policy is not only unjustified but also unreasonable.

The second Applicant's grounds may be summarised as follows:

(i) that at the Public Service Commission had abused its discretion and had acted unreasonably and/or arbitrarily by taking into consideration irrelevant matters while failing to take into consideration relevant matters;

(ii) that the Public Service Commission had acted illegally acting in breach of the GO, the Regulations, the Act and the Constitution; and

(iii) that the Public Service Commission had acted contrary to the legitimate expectations of the second Applicant, in not following the procedures under the collective agreement.

The Respondents' counsel raised initial objection to the Applicants introducing new grounds after leave had been obtained. However leave had been given to the Applicants at the hearing of 7 August 2007 to amend their statements under O 53 r 3(2).

Court's consideration

I will deal with individual grounds raised by each of the Applicants, and where they coincide, together.

1. Legal authority of Cabinet

The first Applicant claims that the Respondents did not have the lawful authority to lower the compulsory retirement age to 55, since the Cabinet was not constituted in accordance with the Constitution (Amendment) Act 1997, specifically a democratically elected multi-party Cabinet under s 99 of the Constitution. The crux of the argument is that the decision is an executive one

which can only be made by the minister albeit through Cabinet, and given that the minister and/or Cabinet were appointed and exist outside the Constitution, they are not lawful appointment and decisions emanating there from are invalid. Much reliance is placed by counsel on the Privy Council decision in *Bribe Commissioner v Pedrick Ranasinghe* [1954] UKPC 1 (*Bribe Commissioner*). The Respondent in that case was prosecuted for a bribery offence before the Bribery Tribunal. He was convicted and sentenced to a term of imprisonment and a fine. On appeal to the Supreme Court of Ceylon, the court declared the conviction and orders made against him null and inoperative on the ground that the persons composing the tribunal which tried him were not lawfully appointed to the tribunal. The Privy Council, on appeal by the commissioner, agreed. The first Appellant also referred to the Australian High Court decision in *Annetts v McCann* (1990) 170 CLR 596; 97 ALR 177; 21 ALD 651 (*Annetts*) for the proposition that the decision to reduce the compulsory retirement age of public servants, requires and presupposes the exercise of a power created by statute and conferred on an authority by statute. Without or lacking such power; counsel argued, the Respondents may not lawfully lower in any way, the compulsory retirement age.

Counsel for the Respondents submit that the decision to lower the compulsory retirement age as manifested under the Public Service (General) (Retirement Age — Amendment) Regulations 2007, is in exercise of the PSC's powers to make Regulations under s 15(1) of the Public Service Act 1999. There is no exercise of executive function nor that of statutory authority involved. The powers exercised here is regulation-making power that is lawfully bestowed in the Commission. Second, the issue of unconstitutionality or illegality of the Cabinet is moot as the decision is not made by it, even although it approved it (Cabinet Decision No 62/2007).

The primary source of the regulation-making powers of the Commission is in fact found under s 173 of the Constitution. The relevant parts of the section, are subss (1) and (4)–(6) and provide as follows:

> 173 (1) A commission may by regulation make provisions for regulating and facilitating the performances of its functions.
>
> (2) …
>
> (3) …
>
> (4) in the performance of its functions or the exercise of its powers, a commission is not subject to the direction and control of any other person or authority, except as otherwise provided by this Constitution.
>
> (5) Nothing in subsection (4) limits the responsibility of the Government for the structure of the public service or the Fiji Police Force, nor the Government's general policy responsibility for the management of the public service or the Fiji Police Force.
>
> (6) In addition to the functions conferred upon it by or under this Constitution, a commission has such powers and other functions (if any) as are prescribed.

"Commission" under Section 194 (1) of the Constitution "means a commission established by, or constituted in existence under this Constitution". The Public Service Commission existence is recognised under section 142 (b) of the Constitution.

The powers given by the Constitution to the Public Service Commission to make regulations is set out under s 15(1) of the 1999 Act. It is the Public Service Commission, whose exercise of regulatory-making powers, resulted in the gazetting of the Public Service (General) (Retirement Age — Amendment)

Regulations 2007. This being so, then it stands to reason that the decision to lower the retirement age properly belongs to the Commission. The approval or endorsement of Cabinet or the interim Prime Minister does not deny this legal position. Section 15(1) of the Act merely states that the Commission may make regulations "with the approval of the Prime Minister". It is not necessary for the Prime Minister to put his signature of approval on the Regulations as shown in the Public Service Regulations 1999 (LN 48/1999). It is enough that the preamble say that the approval had been obtained. The court therefore agrees with counsel for the Respondents that the lowering of compulsory retiring age by the 2007 Regulation is the exercise of powers by the Commission prescribed to it by the Constitution and the 1999 Act.

The first Applicant referred to *Bribe Commissioner* (above) as support for the proposition that the decision of 9 March 2007 was void and in any case unlawful having been made by Cabinet whose existence is unconstitutional. This court has already found that the decision in question was made by the Commission pursuant to its powers under s 15(1) of the Act, not the Cabinet. But even if it were true that the decision was made by Cabinet and/or the interim minister responsible, the question of legality or otherwise of the present interim regime is already an issue before the court in another case in any event *Bribe Commissioner* case proceeded by way of writ and arguments have not been fully canvassed before the court on whether judicial review should be the proper form of redress seeking an order for certiorari in situation of allegation of usurpation of lawful authority.

For the reasons above the court finds that the first Applicant's ground is without merit and must fail.

2. Is lowering of compulsory retirement age incompatible with s 38 of the Constitution?

Both Applicants argue that the 9 March 2007 decision lowering the compulsory retirement age of government employees is incompatible with Ch 4 of the Constitution (Bill of Rights) and specifically s 38 on equality before the law. Section 38(2) and (3) state that:

> (2) A person must not be unfairly discriminated against, directly or indirectly, on the ground of his or her:
>
> (a) actual or supposed characteristics or circumstances including race, ethnic origin, gender, sexual orientation, birth, primary language, economic states, age or disability; or
>
> (b) opinions or beliefs, except to the extent that those opinions or beliefs involve harm to others or the diminution of the rights or freedoms of others;
>
> or on other ground prohibited by this Constitution.
>
> (3) Accordingly, neither a law nor an administrative action taken under a law may directly or indirectly impose a disability or restriction on any person on a prohibited ground.

The submission by the Applicants is that the members of their trade unions are being discriminated against and that their rights protected under s 38 above, have been breached. They referred especially to the recent High Court judgment of Coventry J in *Proceedings Commissioner, Fiji Human Rights Commission v Suva City Council* HBC No 3/2004, in which his Lordship found that the provisions of the collective agreement between the council and its employees, giving the council the discretion to compulsory retire any employee on attaining the age of 55, was discriminatory and therefore null and void.

Counsel concede that s 38(7) of the Constitution, provide exceptions to subss (1)–(3). In particular, subs (7)(b) states that:

> (7) A law is not inconsistent with subsections (1), (2) or (3) on the ground that it:
>
> (a) …
>
> (b) Imposes retirement age on a person who is the holder of a public office
>
> (c) …
>
> (d) …
>
> (e) …
>
> But only to the extent that the law is reasonable and justifiable in a free and democratic society.

It is accepted that under the interpretation provisions of the Constitution (s 194(1)), all members of both Applicant trade unions are holders of public office either as "an office in a state service" or "an office or a member of, a statutory authority". However, for the authorities to impose retirement age under subs (b) it must satisfy the threshold requirement that the imposition is "reasonable and justifiable in a free and democratic society".

The Respondent had at the outset submitted that s 38 remedy is only available to an individual, not associations or groups as in the case of the Applicants in this instance. As such they have no interest at all or no sufficient interest to support their application.

Counsel argued that s 38 fails under Ch 4 which deals specifically with individual rights of ordinary citizens. This argument is, according to counsel, reinforced by the wordings of s 38 itself which speak of a "person" who is discriminated against on the ground of "his" or "her" protected rights. Similarly s 41, the enforcement provision, allows for "a person" who considers "his" or "hers" rights has been or likely to be contravened, "then that person may apply to the High Court for redress". As for the definition of "person" as including plural and association or body of persons corporate or unincorporated in s 194(1), the Respondents argue that ss 38 and 41 "person" is an exception and falls into the "unless the contrary intention appears" category of the definition provision. There is clearly, in the Respondent's view, the purpose and as well as the legislative intention of Ch 4 including s 38, that they may only be invoked by the individual. This is especially so when the proposition is considered alongside the wordings of the enforcement provisions in s 41 where Respondents argue, there clearly is shown that while allegation of breach or imminent breach of rights are limited to individuals, exception is made allowing another person action of redress where the person wronged is detained. This, according to the Respondent, is the only exception to the scheme of individual or personal actions under Ch 4.

The Respondents argued further that even if the Applicants could bring an action on behalf of their members under s 38, the enforcement provision (s 41) may only be successfully raised, in such a situation, if it is expressly permitted in a legislation. Thus under s 36 of Fiji's Human Rights Commission Act 1999 the Proceedings Commissioner may bring s 41 proceedings on behalf of a class of persons. In this instance, the Applicants may only bring any action on infringement of s 38 rights of their members if they are made pursuant to s 41 proceedings through the Proceedings Commissioner for the Human Rights Commission.

This court is not persuaded by the Respondent's argument that s 38 and indeed s 41 of the Constitution should be strictly construed. Counsel for the Respondent readily concede that in some situations such as in compulsory acquisition of the

Appellants' property they may bring an action for redress under s 41. The Appellants are two organisations representing the majority of public servants of Fiji. In addition, they are body corporates and possess legal personalities of their own. They can sue or be sued in their own rights or on behalf of their members. Since they can sue on behalf of their individual members to assert or enforce their rights as workers so must it follow, I believe, they can sue to assert the individual rights of their members as guaranteed under the Constitution. While the Human Rights Commission provides a readily available vehicle for enforcement of individual rights, it is not the only one. The "person" who may be aggrieved for breaches of individual rights under the Bill of Rights and who may bring proceedings under s 41 should be given its most liberal interpretation to include a membership of persons as in an association of a trade union. In enacting the Bill of Rights in the Constitution, the Fiji Parliament intended that rights and freedoms of its citizens should be enjoyed fully without fetter. To adopt a deferential interpretation would undermine the ultimate objective of the guarantee and protection of individual liberties. In my view therefore, the restriction placed on ss 38 and 41 by the Respondents is as onerous requirement that was never intended by the legislature. It is a well-established convention and practice that constitutionally guaranteed rights should be given a broad and liberal interpretation.

In this case the Applicants have relied on s 38 to attack the decision by the Respondents by way of judicial review. The fact that they have relied on s 38 does not mean that they can only proceed by way of constitutional redress procedure available under s 41. They are, in my view, perfectly entitled to proceed by way of judicial review and at the same time rely on alleged breaches of individual rights under Ch 4. The courts have already established since *R v Monopolies and Mergers Commission; Ex parte Elders IXL Ltd* [1987] 1 All ER 451, that exercises of statutory or other public law power that involves a decision or determination affecting an individual are subject of judicial review. Importantly, the courts conclude that "individual" includes legal individual such as a company or association.

In the alternative, the Respondents argue that even if the court found that the Applicants can bring an action on behalf of its members, s 38(7) allows the Respondents exceptions, including imposition of retirement age "to the extent that the law is reasonable and justifiable in a free and democratic society". The burden is on the Respondents to show that the decision to lower the retirement age to 55 "is reasonable and justifiable in a free and democratic society". To fully appreciate or understand what is reasonable and justifiable the parameters must first be satisfied that is the existence of "a free and democratic society". It could very well be argued that for the time being the wherewithal to a free and democratic society is not present, in the absence of a democratically elected government. However it is the character of a free and democratic society, that is in question and to which the court must relate to in deciding what is reasonable and justifiable. While the position the court finds itself in seems incongruous, it is unavoidable.

In support of the argument that the decision was reasonable and justifiable, the Respondent referred to decisions of Canadian courts that have examined the concept. Counsel urged that the proper test to apply is to ask whether the policy, resulting in the decision taken, further a substantial objective. If so, then is the policy proportional to or rationally connected to that objective. According to the Respondents, the objectives in the lowering of the retirement age were, to reduce

operational costs to government and releasing the funds to capital expenditure, to provide employment to many unemployed undergraduates, and at the same time restructure the civil service. As far as the government was concerned, there was no other alternative in securing these objectives, but to lower the mandatory retirement age.

The court has now had the opportunity to look at the Canadian courts' judgments referred to by the Respondents. They have distinguishable characters. Most involve universities or hospitals. They are by and large autonomous and do not form part of "government" under their Charter of Rights, and their employees would therefore not be holders of "public office" as defined under s 38(7) of our Constitution. The most important factor distinguishing the relevant Canadian cases, is the existence already of a collective agreement between the institutions and their employees. These agreements which included the compulsory retirement age, had been negotiated either personally or through their respective organisations. The compulsory retirement age was not a condition imposed on their employees but derived from negotiations and arrangements between the parties. It was the individual and staff member of these institutions that sought to challenge the provision of compulsory retirement age of 65. This is an important factor when considering whether compulsory retirement age was reasonable. The Canadian Supreme Court in *Olive Patricia Dickason v Governors of University of Alberta and Anor* [1992] 2 SCR 1103 held the view at [46] that:

> in determining whether the practice of mandatory retirement constitutes reasonable justification for age discrimination the fact that this option was chosen by way of an agreement between an employer and the faculty association should be recognised. Members of the faculty association may, even more than same rank and file member of other unions, appreciate the significance and consequences of a mandatory retirement policy for themselves, for the faculty association and for the university. Such an agreement should not be lightly disregarded. In this case the university may properly rely on the collective agreement as evidence which tends to confirm the reasonableness of the mandatory retirement policy.

But even if this court were to adopt the precedents set by the Canadian Courts, the proper test, to be applied, in the fight of the Respondents' submission is summarised by Dickson CJC in *R v Edwards Books & Art Ltd* (1986) 35 ULR (4th) 1 at 41; [1986] 2 SCR 713 (*Edwards Books*):

> Two requirements must be satisfied that a limit is reasonable and demonstrably justified in a free and democratic society. First, the legislative objective which the limitation is designed to promote must be of sufficient importance to warrant overriding a constitutional right. It must bear on a "pressings and substantial concern". Secondly, the means chosen to attain those objectives must be proportional or appropriate to the ends. The proportionality requirement in turn, normally, has three aspects: the limiting measures must be carefully designed, or rationally connected, to the objective; they must impair the rights as little as possible; and their effects must not so severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgment of rights. (emphasis added)

In this case, the Respondents "pressing and substantial concern" that they rely upon to justify the curtailment of the employee's rights under s 37, are the reduction of operation costs through compulsory redundancy of employees, and the resultant increase in funds for capital expenditure from the savings in salaries and wages of redundant employees through the imposed lowering of retirement age to 55. In addition, the Respondents say that the policy is intended to assist the unemployed especially the undergraduates find employment replacing those

retiring. It was also the opportunity, "to restructure" the public service. The affidavits of the Secretary of the Public Service Commission, Ms Taina Tagicakibau, and Agni Deo Singh, the General Secretary of the Fiji Teachers Union (FTC) are filed by the Respondents to support these policy considerations.

It is in this court's considered opinion, that the policy considerations put forward by the Respondents, do not come anywhere near meeting the test of a "pressing and substantial concern" that may justify the abridgment of the rights of an individual member of either the FTA or FPSA under s 38(7) of the Constitution. The Respondents have not demonstrated in any meaningful way, facts or arguments, sufficient to satisfy the court that any of the grounds advanced are of a substantial and pressing nature to satisfy the test for the application of exclusionary provisions under s 38(7). For example a saving of $79,519,530, according to Ms Tagicakibau's affidavit, will be made if the policy is implemented from 1 January 2008 and if no replacement, recruitment or acting appointment is made. Yet it is obvious from the evidence of all the parties that zero replacement or recruitment is not in the contemplation of the Respondents at all. This is easily proved from the policy intentions to recruit unemployed undergraduates and re-employment on needs basis, to fill the vacancies created by the retirees at 55. Why then should Respondents highlight a savings of $79,519,530 knowing fully well that it would never happen, except as the court sees it, to exaggerate the savings. Again, at para 16 of her affidavit of 26 September 2007, Ms Tagicakibau states "That if posts were filled selectively according to areas of needs, Government would save up to $10,455,610 when this policy takes full effect on 1 January 2008". Yet, the Respondents have failed in any material way, to produce to this court evidence in support of the claim. While there is financial hardship all around that needs to be addressed, and Respondents have identified reduction of the total number in the civil service through lowering the compulsory retirement age as a way of creating job opportunities and more funds for capital works, they have failed to satisfy the court that it is the only alternative available to adhere to its objective. This goes to the second limb of the test. In *McKinney v University of Guelph* (1990) 76 DLR (4th); [1990] 3 SCR 229 (*McKinney*) the Supreme Court of Canada referred to the test outlined in *Edward Books* (above) and on the standard to be applied to minimum impairment test stated, per Wilson J at DLR 618:

> In assessing reasonableness pursuant to this standard two factors remain relevant. (1) the objective, and (2) the availability of alternative means. In *Edward Books*, it was held that the Court should not interfere with legislative wisdom if there are no alternative means of achieving the objective which are clearly better in terms of both minimizing the impairment of the charter rights and meeting the objective. In the context of these appeals it has not been established that clearly better means are not available. Indeed the appellants have pointed to the mechanism of voluntary retirement coupled with strong incentives to retire as not only viable but an equally effective way of meeting the objective.

From the evidence presented to this court it cannot be said that there are no alternative means available to the parties to achieve the same objective and at the same time cause minimum of impairment to the rights protected under Ch 4 of our Constitution. To illustrate the point, the court notes that in its report of a trade dispute to the Permanent Secretary of Labour of 21 June 2007, the second Respondent stated:

> We believe that by forcefully retiring public officers prior to their stipulated compulsory retiring age, the Commission is making them prematurely redundant. In the

> latter case there should be consideration of some form of compensation for past service and also for the period of future service forgone. None of these were offered, discussed or agreed upon. (emphasis added)

Both the Respondents and Agni Leo Singh on behalf of FTLI, lay great emphasis on employment of undergraduates, and the need to implement the new 55 compulsory retirement age, as a way of reducing the unemployed. Mr Singh estimates the number of undergraduates as over 2000 with 800 qualified teachers among them. In Mr Singh's submission, many of the government employees that will be affected would have served for at least 34 years and at 55 they are eligible for their FNPF contributions which he suggested, that "they may take this as a lump sum and start a business of their own or receive it by way of fortnightly pensions". This argument I must say, lacks any merit whatsoever. First, as the Applicants make clear; not all employees would have served at least 30 years in the service. Not all employees would have accumulated enough FNPF funds at 55 to retire or start their own business or come under a suitable pensionable scheme. In any case, the fact that not everyone will be in the same position, is discriminatory of itself.

There is also a grave danger of the policy falling foul of the provisions of s 140 of the Constitution that deals with the recruitment and promotion policy in all the state services. Two of the guiding principles set out at (a) and (b) as follows:

> (a) government policies should be carried out effectively and efficiently and with due economy;
> (b) appointments and promotions should be on the basis of merit …

At no time have the Respondents made a case that the policy decision was linked to productivity and that the retirement at 55 would ensure increased productivity with the introduction of younger civil servants. The merit in the retention of older and experienced employees had not been raised nor questioned. If indeed this is the case, will not then the Respondents be making appointments into the service that fall outside the guiding principles of s 140? This in turn raises the requirement that government policies be carried out effectively and efficiently. The court agrees with counsel for the second Applicant arguing that this objective may be difficult to attain by the replacement of still productive and experienced employees with inexperienced younger members.

The objective of giving employment opportunities to unemployed undergraduates in the place of those employees retired at 55 is tenuous to say the least. It is discriminatory of itself. This argument was quickly dismissed in *McKinney* case (above). La Forest J said, at DLR 664:

> As for the objective of reducing youth unemployment, it seems to me that such objective should not be accorded much weight. If the values and principles essential to a free and democratic society include, according to *Oakes*, "respect for the inherent dignity of the human person" and "commitment to social justice and equality", then the objective of forcibly retiring older workers in order to make way for younger workers is itself discriminatory since it assumes that the continued employment of some individuals is less important to those individuals, and less value to society at large, than is the employment of other individuals, solely on the basis of age.

The respect for the "inherent dignity of the human person" and "commitment to social justice and equality" form part of our own Constitution. They are encoded in the Compact of Governing Principles under Ch 2 and the Bill of Rights in Ch 4. For the reasons explained by La Forest J above, I do not find any merit in the Respondents relying on this objective as a ground of its decision.

Finally, the Respondents submit that the policy decision is taken to assist in the "re-structuring" of the civil service. Again the Respondents have failed to lay out in details how the lowering of retirement age to 55 will assist in the re-structuring of the civil service, apart from the reduction of the total number in the service. As a legislative objective it easily fails the test of it being of sufficient importance to warrant the overriding of a constitutional right.

It is evident from the court's views expressed above, that the objectives of the policy decision resulting in the Public Service (General) (Retirement Age — Amendment) Regulations 2007 do not meet the threshold requirement of what is reasonable and justifiable in a democratic society. The policy may be said to further a substantial objective of creating employment for the unemployed and at the same time reducing some costs to government but, it is, in the view of this court, neither proportionate nor rationally connected to the objectives to be accomplished. In the result, this court finds that the application of the exception to equality as to age provided for in s 38(7)(b) of the Constitution, and argued by the Respondents, cannot be sustained. The decision is not one that can be said is reasonable and justifiable in a democratic society. That being so, it follows that the decision is in breach of s 38 of the Constitution.

Legitimate expectations

This ground is raised by both Appellants, and normally falls under the umbrella ground of "procedural impropriety" as defined by Lord Diplock in *Council of Civil Service Unions v Minister of Civil Services* [1985] AC 374; [1984] 3 All ER 935 (*CCSU*). The doctrine of legitimate expectation belongs to the category of interests which is likely to be affected by exercise of power and which in turn require observance of the principles of natural justice as a condition of the power to be validly exercised. Counsel for the second Appellant summarised it this way, "The basis of the doctrine of legitimate expectation is that notwithstanding the absence of a legal right or interest, good administration demands the observance of the principles of natural justice where a citizen may legitimately be expected to be treated fairly". It is however well to remember that the protection of a "legitimate expectation" is not of itself an independent foundation of a jurisdiction to grant a remedy. It's the consequence of the availability of a remedy to give effect to a statute. As Brennan J posed in *Annetts* at CLR 605; ALR 184; ALD 656:

> If the jurisdiction to grant a judicial review remedy is thought to arise from the existence of a legitimate expectation rather than an implied statutory condition, what is the criteria of legitimacy? Legitimacy has been attributed to expectations that originate in specified ways such as representations, practices and assurances.

The expectation must therefore arise by an undertaking or promise or by established practice or custom. In *Re Westminster Count Council* [1986] AC 688, Lord Bridge said, at 692:

> The Courts have developed a relatively novel doctrine in public law that a duty of consultation may arise from a legitimate expectation of consultation aroused either by a promise or by an established practice of consultation.

Lord Bridge was talking of only an interest among a bundle of interests that together make up the doctrine of legitimate expectations. The duty to consult is the most recognised of these interests. Lord Diplock in *CCSU* case defined the right of a person to challenge under this doctrine if the decision has the effect of, at AC 408; All ER 949, "(b) depriving him of some benefit or advantage which either (i) he had in the past being permitted by the decision-maker to enjoy and

which it can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given the opportunity to comment; or (ii) he has received assurance from the decision-maker will not be withdrawn without giving him first the opportunity of advancing reasons for contending that they should not be withdrawn. I prefer to continue to call the kind of expectation that qualifies a decision for inclusion in class (b) a 'legitimate expectation' rather than a 'reasonable expectation' in order thereby to indicate that it has consequences to which effect will be given in public law, whereas the expectation or hope that some benefit or advantage would continue to be enjoyed, although it might well be entertained by a 'reasonable' would not necessarily have such consequences …"

The Fiji Court of Appeal in *Pacific Transport Co Ltd v Mohammed Jalil Khan and Ors* FCA CA No 21/1996 agreed with the application of the doctrine as expressed in the English decisions cited. The essential elements discerned from these cases, are that legitimate expectation may arise by giving of assurances and/or the existence of regular practice that is expected to be followed.

In this case, both Applicants submit that since the decision affects the terms and conditions of their members' employment, they, as representatives of the members expected to be consulted by the Respondents.

The second Applicant further submits, that in addition, it had legitimate expectation, that should the consultation process fail, the Respondents were obliged under the master collective agreement, to refer the matter as a trade dispute, under the Trade Disputes Act (Cap 97).

The Respondents' counsel argue that the decision by the Respondents is an exercise of legislative or executive authority be it original or, delegated, and as such there was no duty to consult. Therefore the subject matter is non-justiciable. As a result the decision was not amenable to judicial review. This category of cases belong to "matters of high policy" which result from the exercise of executive functions under prerogative powers. The category is described by Taylor LJ in *R v Foreign Secretary; Ex parte Everett* [1989] QB 811 at 820 as "matters so vital to the survival and welfare of the nation as the conduct of relations with foreign states" and domestically, where executive decisions involve "competing policy considerations".

In the alternative, the Respondents argue that they had consulted widely with CPSU (4 times) and the FPSU (3 times) on the mandatory retirement age policy. That no agreement was reached does not deny the fact that the Applicants had been consulted.

I entertain grave doubts that the decision to lower compulsory retiring age of civil servants fall into "matters of high policy". In the first place, the decision was by the Public Service Commission and was not executive decision. It was a matter of administrative decision, affecting the rights of individuals. But even if it were, executive, it does not necessarily deny this court jurisdiction. As Lord Diplock stated in the *CCSU* case at AC 410; All ER 951:

> As respects "Procedural propriety" I see no reason why it should not be a ground for judicial review made under powers which the ultimate source is the prerogative.

Lord Diplock referred to *R v Criminal Injuries Compensation Board; Ex parte Lain* [1967] 2 QB 864; [1967] 2 All ER 770, where the subject matter of the judicial review was an executive authority by an act of the Crown; and in which

the court held that it had jurisdiction to inquire into the decision of the board in order to see whether there is on the face of the record, an error of law. Lord Diplock then continued:

> Indeed, where the decision is one which does not alter rights or obligations enforceable in private law but only deprives a person of legitimate expectations, "procedural impropriety" will normally provide the only ground on which the decision is open to judicial review. But in any event what procedure will satisfy the public law requirement of procedural propriety depends upon the subject matter of the decisions, the executive function of the decision-maker (if the decision is not that of an administrative tribunal) and the particular circumstances in which the decision carne to be made.

I do not have any doubt that this court similarly has jurisdiction to entertain the present application for an order of certiorari against the Public Service Commission.

In this case there is in existence the general orders which prescribe the terms and conditions of service of all employees. It is legally recognised by both the Applicants and the Respondents as master collective agreement between the employees and the first Respondent. Its status and effect were fully explored by the Arbitration Tribunal in its decision of 20 October 1997 (*Fiji Public Service Commission v Public Service Commission* Award No 23/1995). It is important to highlight some of the tribunal's findings relevant to the issue before the court. The Commission had argued that if the general orders were to be taken and recognised as a collective agreement, then the PSC Regulations regulating also the terms and conditions of employment, would be a nullity or at least redundant. The tribunal observed:

> … Such approach is also overly simplistic. It assumes it must be one or the other and there can be no co-existence. Having held that those General Orders are properly registered as a collective agreement in no way fettered the Commission from exercising the powers it is conferred by law and constitutional fiat. It is just that those powers have to be exercised mindful of other relevant legislation. Where the provisionals of General Orders related to terms and conditions of employment upon which the Association and the other unions have a right to negotiate, then those may not be changed without consultation and agreement.

While the tribunal's decision is not binding on this court, it nevertheless is an interpretation the court shares and fully endorses. The courts have made clear and reiterated by Lord Diplock in the *CCSU* case that any action which has the intention of varying the terms and conditions of employment of civil servants may be reviewed on the grounds of illegality, irrationality or procedural impropriety. As to the latter, the expectation by the Applicants to be consulted was a legitimate one, given past practices. It is, in my view, reasonable to expect that the Commission consult with its employees in matters that affect their employment. Lowering the compulsory retirement age from 60 to 55 is such a matter. Not to do so, would in Lord Diplock's term amount to "procedural impropriety" described as the failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision.

In the alternative, counsel for the Respondents argue that should the court rule that there was a duty to consult, the Commission had in fact held these consultations. According to the affidavits of Taina Tagicakibau consultations were held with the first Applicant in their three meetings with FPSU held on 1, 12 and 20 February 2007 and with the second Applicant in their four meetings

with CPSU held on 5, 12, 20 February 2007 and 8 July 2007. In all of these meetings, the lowering of the mandatory retirement age to 55 were discussed. The minutes of these meetings were produced in court.

I have read through ail the minutes of the meetings. I offer the following observations. It is evident from the records of all these meetings that the Commission had gone into great length to explain to the Applicants and the other associated unions the reasons behind the policy decision. These reasons have been fully discussed above. What is equally clear from the records, is the fact that at no time was there any discussion on alternatives or other ways of achieving the same objectives. The court had earlier referred to the proposals, that the second Applicant had underlined in its letter of 21 July 2007 to the Permanent Secretary of Labour. Similarly, proposals were contained in the Fiji Nursing Association's letter to the Permanent Secretary of Labour of 26 June 2007. These would have provided suitable themes for parties to discuss alternatives. Instead, the decision to lower the mandatory retirement age was more or less presented as a fait accompli to the Applicants. Except for FTU, all the unions opposed the proposal. There were no options offered or discussed. The only option which was given to the unions, according to Ms Tagicakibau, was the "phased implementation" of the new retirement age policy, which, the unions also rejected. With respect, this was not an option at all. It was merely, as the term suggests, an implementation procedure, after the decision had been made, albeit by the Commission, alone. At any rate, the Commission insisted that the Applicants were consulted and according to Ms Tagicakibau, "Consultation does not mean that Government had to follow the wishes of the Unions".

"Consultation" is defined in the *Shorter Oxford English Dictionary on Historical Principles*, 3rd ed as "the action of consulting or taking counsel together; deliberation conference". "Consult" means "1. To take counsel together, deliberate, confer; 2. To confer about, deliberate upon, consider; 3. to take counsel to bring about; to plan; devise; contrive; 4. To provide for by consultation; to have an eye to; 5. To ask advise of, seek counsel from; to have recourse to for instructions or professional advise".

Consultation is a process that by definition means talking and discussing together, while seeking advise and counsel. It invokes the idea of coming together, discussing, listening, taking counsel and reaching consensus. But the term means much more, and I will suggest, takes on a technical meaning, when used to define meetings of parties, such as employer-employee, in the field of industrial relations and under the auspices of collective agreements. Consultation in this context, given that one is dealing with terms and conditions of service, by implication, means *consultation and agreement*. This is especially so given the existence of the legislative frameworks, such as the Trade Dispute Act, that lends support to situations such as failure to agree after consultations under a collective agreement.

In my view therefore the meetings held by the Commission and the Respondents failed to satisfy the requirements of legitimate expectation by the Respondent to be consulted. These meetings were no more than a forum for the Commission to explain the objectives of the impending decision and why it was necessary. Alternatives were neither raised nor discussed, even although the Respondents were open to them. There were no negotiations. There was no consultation as required under the master collective agreement. In these circumstances the court finds and is satisfied that there was procedural

impropriety in that the Respondents, by not consulting with the Applicants, had failed to observe the basic rule of natural justice.

The second Applicant had further argued under the doctrine of legitimate expectation, that the Respondents had neglected to refer the matter to arbitration following the failure to reach any agreement. Given that the court has already found procedural impropriety in the way the Respondents had arrived at its decision, and also the fact that the Applicants had not agreed to its implementation, then it is reasonable to expect the matter, relating as it does to the terms of employment and therefore come under the collective master agreement, should have been deemed by the Respondents as a "trade dispute" within the definition of s 2 of the Act, and reported to the Permanent Secretary of Labour, under s 3. That the Respondents failed to do so, can legitimately be argued as made by the second Applicant, as further instance of failure by the Commission to observe procedural fairness. The court finds it so.

Failure to give a reason

This ground is raised by the first Applicant. It specifically referred to PSC Circular No 8/2007, that conveyed the decision, but not the reasons of the lowering of the mandatory retirement age.

This ground is dismissed for the simple reason that the first Applicant, along with the other Unions had been fully informed in their various meetings with the Commission, of the reasons the decision was being taken.

Decision is unreasonable

This ground is raised by the second Applicant. In support, counsel said that the Commission was fully aware of the massive brain drain that resulted from the previous occasion, when the retirement age was similarly lowered with hindsight, the second Applicant contends, the decision is not only reasonable but irrational.

While the argument may have held true on the previous occasion, the Respondent argues that the situation is different this time round. Not only are there contingency plans, such as the re-hiring policy, and staggered implementation periods, the necessity and urgency of the occasion calls for the complementation of such a drastic policy. The court agrees that in the circumstances, the decision may not necessarily be unreasonable nor irrational.

Pensions Act 1993

I have not included the effect of the decision being challenged, on the Pension Act, because it was not argued before me. The court had raised it at the end of counsel's submission and the views expressed were at best preliminary. However, it is pertinent to note that s 9 of the Act recognises and protects the right of a civil servant in a pensionable office to compulsory retire at the age of 60 years. It is of course probable that amendments to the Act may be made by way of decree, given that there is no parliament, but the subjugation of an enactment to a delegated regulatory authority is the more pertinent issue that is raised as a consequence. However, I would prefer to leave the resolution of the question to a more appropriate occasion.

Conclusion

In the end, it is the findings of this court:

(1) that the Appellants possess the legal capacity and persona to represent their individual members, in bringing actions under Ch 4 of the Constitution;

(2) the Respondents, by lowering the mandatory retirement age of civil servants to 55, without the agreement of the affected party, had acted in breach of s 38 of the Constitution which protects an individual from discrimination on the basis of age;

(3) that the Respondents have failed to satisfy the threshold requirements of what is reasonable and justifiable in a democratic society that would have provided the exception to s 38 as permissible under subs (7);

(4) that the Respondents had, by not consulting and reaching an agreement with the Applicants, on amendments to the master collective agreement, failed to observe the basic rules of natural justice;

(5) that the Respondents by not preferring to refer the matter as a trade dispute under the Act, had acted contrary to the legitimate expectations of the Applicants.

In the result a declaration is made that the decision of 9 March 2007 is in breach of s 38 of the Constitution. It is unlawful and therefore null and void.

An order of certiorari is made removing the said decision into this court, and the decision be and is hereby quashed.

Costs is summarily assessed at $850 to each of the Applicants to be paid within 14 days.

Application granted.