

*Delcy n JR*

IN THE SUPREME COURT OF FIJI ISLANDS  
AT SUVA

Petition for Special Leave to Appeal No CBV0011/08  
[From the Court of Appeal Civil Appeal No. ABU 5/07  
And High Court Judicial Review No. HB] 23 of 2006S]

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BETWEEN : PUBLIC SERVICE COMMISSION  
PETITIONER

AND : BRIAN SINGH  
FIRST RESPONDENT

AND : PUBLIC SERVICE APPEALS BOARD  
SECOND RESPONDENT

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CORAM : The Hon. Justice John Byrne, Justice of Supreme Court  
The Hon. Justice William Marshall, Justice of Supreme Court  
The Hon. Justice Sosefo Inoke, Justice of Supreme Court

COUNSEL : Messrs C Pryde, S Sharma and K Singh for the  
Petitioner  
Mr S Leweniqila for the First Respondent

Date of Hearing : 9 August 2010

Date of Judgment: 27 August 2010

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## JUDGMENT OF THE COURT

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### INTRODUCTION

1. This petition arose out of an application for judicial review in the High Court. It was an application by the Petitioner for an order of *certiorari* to remove and quash a decision of the Second Respondent. Under **Order 53 Rule 4(2)** of the **High Court Rules 1988** the period within which an application for leave to issue judicial review for such relief must be made within 3 months after the date of the decision. **Rule 4(1)** provides that when such an application is made after that period has expired, the court may refuse to grant leave for the application for *certiorari* if it considers there has been undue delay in making the application.

### THE BACKGROUND

2. The First Respondent (Mr Singh) was the former Chief Executive Officer of the Ministry of Labour, Industrial Relations and Productivity. In July 2004, nineteen disciplinary charges were laid against him by the Petitioner ("PSC"). The charges were heard on 30 November 2004. He was found guilty and his contract of employment was terminated by the PSC. He appealed to the Second Respondent ("PSAB") which reversed the PSC decision on 23 March 2006. PSC then applied for judicial review in the High Court. The application

for leave to issue judicial review was filed on **29 June 2006**. The High Court dismissed the PSC application on 29 November 2006 and they appealed to the Court of Appeal. The Court of Appeal dismissed that appeal on 3 November 2008 and the PSC now appeals to this Court.

**Order 53, Rules 3 and 4 of the High Court Rules 1988**

3. **Order 53 Rule 3(1) provides:**

"No application for judicial review shall be made unless the leave of the Court has been obtained in accordance with this rule."

4. **Order 53 Rule 4(1) provides:**

"Subject to the provisions of this rule, where in any case the Court considers there has been undue delay in making an application for judicial review or, in a case to which paragraph 2 applies, the application for leave under rule 3 is made after the relevant period has expired, the Court may refuse to grant –

(a) Leave for the making of the application;

(b) Any relief sought on the application,

if, in the opinion of the court, the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.

5. **Order 53 Rule 4(2) provides:**

"In the case of an application for an order of certiorari to remove any judgment, order, conviction or other proceedings for the purpose of quashing it, the relevant period for the purpose of paragraph (1) is three months after the date of the proceeding."

6. **Order 53 Rule 4(3) provides:**

"Paragraph (1) is without prejudice to any statutory provisions which has the effect of limiting the time within which an application for judicial review may be made."

**The Trial Judge's Findings**

7. The trial Judge's findings as appear in the Court of Appeal judgment reported in **Public Service Commission v Singh** [2008] FJCA 64; ABU0005.20075 (3 November 2008) were as follows:

[10] Singh J held that under Rule 4 the time for making an application for certiorari on the face of it ran out on 23 June 2006 but noted that on the evidence it was likely that the PSC did not get notice of the decision until after 5 pm on 28 March 2006 when a copy was faxed to it by Mr Singh's lawyers. Accordingly it was possible that the application was within the time specified in Rule 4(2) when account was taken of Order 3 Rule 2(2) which provides that "where an act is required to be done within a specified period after or from a specific date, the period begins immediately after that date."

[11] The trial judge, following **R (Anufrijeva) v Secretary of State for Home Department** [2004] 1AC 604, found that the specified date was the date when notice of the decision was given to the applicant and not the date of the decision, and that accordingly the 3 months ran from 29 March 2006 and that the application was in time.

[12] However the trial judge held that even if an application is made within the three month period it may still be considered that there was undue delay. The trial judge relied on **R v Herrod, Ex-parte Leeds Council** [1976] 1 QB 540 at 575A.

[13] The trial judge found that the PSAB ought not to have allowed Mr Singh's appeal because an investigation into Mr Singh's conduct had been carried out by the Ministry of Finance (albeit not requested by the PSC) and a report delivered to the PSC. It would have been a useless exercise for the PSC to conduct a further investigation. However the trial judge found that the PSC

had been guilty of unreasonable delay in bringing the judicial review proceedings and he dismissed the PSC's application for leave with costs.

### The Court of Appeal

8. The PSC then appealed to the Court of Appeal. The Court of Appeal held in its judgment of 3 November 2008 that:
  - a. The time for filing judicial review proceedings ran from the date of notification and not from the date of the judgment being reviewed.
  - b. A judge had discretion to deal with the issue of delay at leave stage and disallow leave for judicial review even if the application was filed within the 3 months period.
9. The Court of Appeal accordingly dismissed the PSC appeal. PSC now applies to this Court for special leave to appeal on these two points of law.

### Special Leave to Appeal

10. Section 7(3) of the Supreme Court Act 1998 provides:

In relation to a civil matter (including a matter involving a constitutional question), the Supreme Court must not grant special leave to appeal unless the case raises-

- (a) a far-reaching question of law;
- (b) a matter of great general or public importance;
- (c) a matter that is otherwise of substantial general interest to the administration of civil justice.

11. The points raised in this appeal are important for the administration of civil justice and raise matters of far reaching questions of law and possibly of great general or public importance. They clearly meet the requirements of s 7(3) of the Supreme Court Act 1998. We therefore grant special leave to appeal and go on to consider the substantive appeal.

### The Substantive Appeal

12. We think the trial Judge and the Court of Appeal were correct in finding that the 3 months period ran from the date on which the relevant party was notified of the decision. The Court of Appeal was right in overruling its earlier decision in Harikisun Ltd v Singh [1996] FJCA 15; ABU0019.1995S (4 October 1996) that time ran from the date of the decision and adopting the House of Lords decision in R (Anufrijeva) v Secretary of State for Home Department [2004] 1 AC 604.
13. However, we think that both Courts were wrong on the second point, namely, whether the trial Judge could go on and consider delay when the application was filed within the 3 months period.
14. The starting point is the relevant rule itself. A close reading of **Order 53 Rule 4(1)** shows that two situations were envisaged by the provision (our emphasis):
  - (a) Where there is delay in making an application for judicial review. The court may refuse to grant the relief sought in the application if it thinks that granting it would be likely to cause substantial hardship to, or substantially prejudice the rights of any person or would be detrimental to good administration.

- (b) Where there is an application for leave to issue judicial review where the relief sought is an order for certiorari, and the application is made after the 3 months has expired, in such a case, the trial Judge is allowed to consider whether there was delay and whether the grant of relief is justified. The rule does not allow him to consider delay if the application was filed within the 3 months period. It is the result of an application of the rule of statutory interpretation *expressio unius est exclusio alterius*.
15. The appeal therefore succeeds on this ground. We need not consider any of the grounds which deal with delay.

#### What Orders are to be made?

16. The outcome of this appeal is that the trial Judge was wrong in dismissing the PSC application for leave for Judicial Review. As noted above, the Court of Appeal observed that the trial Judge did in fact find that the PSAB should not have allowed Mr Singh's appeal. That was a finding which was not disturbed by the Court of Appeal and we think that was correct. The end result is that the PSC decision should stand. The PSAB no longer exists but its decision must be quashed and we order accordingly.

#### Costs

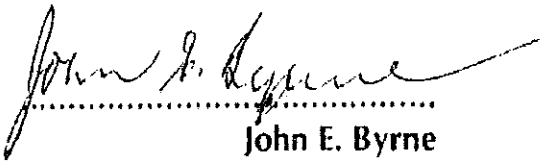
17. The Petitioner is not seeking costs in this Court but asks that the costs orders in the High Court and the Court of Appeal be set aside and reversed. The result of this appeal is that the Petitioner should have won in both of those courts. We therefore award the Petitioner its costs and accordingly reverse the costs orders in those courts. The Petitioner is therefore entitled to its costs of \$700 in the High Court and taxed or agreed costs in the Court of Appeal.

The Orders

18. The Orders are:

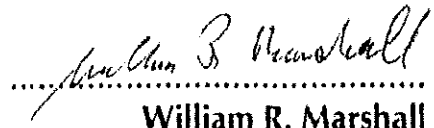
- a. Special Leave to appeal is granted.
- b. The Appeal is allowed.
- c. An order of *certiorari* is granted and the decision of the Second Respondent of 23 March 2006 is hereby quashed.
- d. The First Respondent is to pay the Petitioner's costs in the High Court and the Court of Appeal.

Dated at Suva this 27<sup>th</sup> day of August 2010.



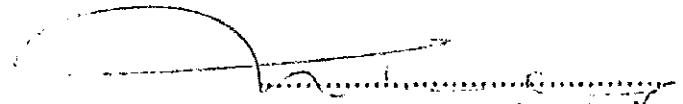
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**John E. Byrne**  
Justice of the Supreme Court



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**William R. Marshall**  
Justice of the Supreme Court



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**Sosefo S. Inoke**  
Justice of the Supreme Court