IN THE FIJI COURT OF APPEAL
Civil Appeal No. 50 of 1985.

Between: JAI NARAYAN Appellant

- and -

UNIVERSITY OF THE SOUTH PACIFIC
DR. EPELI HAU'OFA Respondents

M. S. Sahu Khan for the Appellant.
D. C. Maharaj for the Respondents.

DATE OF HEARING : 10th March, 1986.

DELIVERY OF JUDGMENT: 21st March, 1986.

JUDGMENT OF THE COURT

Roper, J.A.

In 1982 a vacancy arose in the School of Social and Economic Development at the University of the South Pacific (hereafter referred to as "the University") for the post of Reader in Sociology and the position was advertised throughout the South Pacific, Canada, America and England. The advertisement appeared in the local press on the 10th April 1982 but as late as the 5th May in some American publications.

The advertisement concluded in this way:

> " Candidates should send THREE COPIES of their curriculum vitae with full personal particulars, names and addresses of three referees and date of availability, to the Registrar, the University of the South Pacific, P.O. Box 1168, Suva, Fiji, to reach him no later than 30 June 1982. Further particulars are available on request."

The present Appellant, who was then, and still is, a lecturer in Sociology at the University, made application for the post of Reader but his application was not received by the Registrar of the University until the 9th August. No explanation was proffered at the time as to the reason for the delay but at the hearing in the lower Court he said that he had been extremely busy, involved in leave and travel arrangements, and concerned at his wife's illness. The Trial Judge did not find the reasons very convincing and neither do we. It appears from the record that there were 11 applicants, including some from America and Canada who met the deadline of the 30th June, with four applications, including the Appellant's, filed late. Three of the late applications were rejected out of hand by the Registrar but the Appellant's application went forward to the Appointments Committee of the University, with the 11 received within time, for the Committee to decide its fate. This minute of the Committee's meeting of the 20th October, when the applications were considered, tells the story:-

" The Committee noted.....that Dr. Narayan had submitted his application 5 weeks after the closing date and felt that an application which was more than 2-3 weeks late could not be allowed, especially if the applicant was internal. It was agreed that in view of the lateness Dr. Narayan's application be not accepted."

On that day the Committee agreed that the post of Reader should be offered to Dr. Epeli Hau'ofa, the Second Respondent. He accepted and was duly appointed.

The Appellant issued proceedings seeking the following declarations:

"1. For a declaration that the purported appointment of the Second named Defendant Dr. Epeli Hau'ofa as Reader in Sociology is ultra vires, null and void;

2. For a declaration that the First named Defendant wrongly and unlawfully refused to consider the application of the Plaintiff for the position of Reader in Sociology;

3. For a declaration that the First named Defendant's actions in purporting to appoint the second named defendant as Reader in Sociology without considering the Plaintiff's application was ultra vires, null and void and resulted in a breach of Natural Justice;

4. For a declaration that the purported meetings and actions of the First named Defendant for the appointment of the advertised vacancy of Reader in Sociology were contrary to the Charter and therefore ultra vires, null and void and of no effect;

5. For a declaration that the Appointment's Committee of the first named Defendant was not lawfully and/or properly constituted and in accordance with Charter (Cap. 266 of the Laws of Fiji) and therefore its decisions and/or recommendations are of no effect."

Certain orders and damages were also sought in the prayer for relief but were not pursued. Cullinan J. refused in his discretion to grant any of the relief sought and dismissed the Appellant's claim and this is an appeal from that decision.

There is little point in setting out the Appellant's grounds of appeal for they are couched in such vague terms that the real questions for determination cannot be isolated. We shall therefore deal with the matter on the basis of Counsel's submissions. Dr. Sahu Khan's first submission was that Dr. Hau'ofa's appointment was of no effect because it, and indeed the appointment of the Appointments Committee itself, had not been gazetted as required by law. The University was constituted as a body corporate by a Royal Charter made by way of Letters Patent on the 10th February 1970. After lengthy recitals the Charter reads:

> " Now therefore know ye that We by virtue of Our Prerogative Royal in respect of Fiji and of Our especial grace, certain knowledge and mere motion have willed and ordained and by these Presents do for Us, Our Heirs and Successors will and ordain as follows:-
>
> 1. There shall be and is hereby constituted and founded for the communities of the South Pacific a University in Fiji with the name and style of "The University of the South Pacific" (in this Our Charter referred to as "the University").

Dr. Sahu Khan attached significance to the fact that the Prerogative Royal was exercised in respect of Fiji,

and appeared to use that as a basis for applying certain statutory law of Fiji to the Charter. We cannot agree that such an exercise of the prerogative of itself places Fiji in any special position. The prerogative extends to all parts of the Commonwealth of which the Queen is Sovereign and it was logical, as the University was to be established in Fiji, that the prerogative should be exercised in respect of this country.

Dr. Sahu Khan then referred to the following provisions of the Interpretation Act (Cap. 7).

> " All subsidiary legislation shall be published in the Gazette, shall be judicially noticed and shall come into operation on the day of such publication, or, if it is enacted either in the subsidiary legislation or in some other written law that such subsidiary legislation shall come into operation on some other day then, it shall come into operation accordingly."

and the definition of "Subsidiary Legislation" in section 2 which reads:-

> " "subsidiary legislation" means any legislative provision (including an appointment of any person or a transfer or delegation of powers or duties) made in exercise of any power in that behalf conferred by any written law by way of by-law, notice, order, proclamation, regulation, rule, rule of court or other instrument."

In reliance on those provisions he argued that the appointment of the Appointments Committee and Dr. Hau'ofa

was "subsidiary legislation" made in exercise of a power in that behalf conferred by written law, the written law being the Charter. "Written law" is defined in the Act as meaning "all Acts (including this Act) and all subsidiary legislation", and "Act" is defined as meaning "any act of Parliament and includes and Ordinance." The definition of "written law" does not cover an "Imperial enactment" which is defined as:-

> " .....any Act of Parliament of the United Kingdom, any Order in Council or any Letters Patent."

The Charter was made under Letters Patent. Quite apart from that the definition of "Subsidiary Legislation" requires that the appointment be made by way of by-law, notice, order, proclamation, regulation, rule, rule of Court or other instrument, none of which would apply in a University appointment. We therefore conclude that Cullinan J. was right when he held that appointments within the University, whether of committees or individuals, did not require to be gazetted, and we reject Dr. Sahu Khan's first submission.

Dr. Sahu Khan next submitted that contrary to the terms of the Charter no procedure had been established for the making of academic appointments. The Charter provides that there shall be a Council of the University, being its executive governing body, and a Senate responsible for the teaching and other academic work. Section 13(1)(X)

of the Statutes of the University annexed to the Charter provides that the Council shall have the duty,on the recommendation of the Senate, to approve the procedures for the appointment of academic staff, and, on the like recommendation to appoint members of the staff.

Prior to the establishment of the University by Charter there had been in force the University of the South Pacific (Interim Council) Ordinance, which was enacted on the 1st August 1967. It was entituled:-

> " An Ordinance to Establish An Interim Council For The Planning Construction And Establishment In Fiji Of A University Of The South Pacific, For The Government And Administration Of Such University And For Matters Incidental To And Connected Therewith."

Pursuant to a power of delegation contained in the Ordinance the Interim Council appointed a committee named the Academic Advisory Committee, which was in effect the forerunner of the Senate. On the 8th December, 1969 the Academic Advisory Committee made a recommendation to the Interim Council concerning the constitution of committees to deal with appointments of academic staff. It recommended that there be a committee within each school to be called The Applications Review Committee, which would consider all applications and put forward recommendations to an Appointments Committee. The Academic Advisory Committees minute concerning the establishment of the Appointments Committee reads:-

" (ii) an Appointments Committee which would consider those recommendations and decide on the appointment on the basis of the procedure recommended by the Senate. This Committee would include:

Vice-Chancellor;

Head of School;

Head of Subject;

a member of another discipline; and

one or two members of Council (for appointments down to and including Senior Lectureship level)

For a Lecturer (Preliminary) appointment, the Dean of Preliminary Studies and Head of Subject (Preliminary) should also be members."

It is not clear what is meant by the words "on the basis of the procedure recommended by the Senate", for at that time there was no Senate at such, but it appears that what the Academic Advisory Committee did was simply to recommend who should sit as members of the Appointments Committee with the procedure to be adopted being left for determination by the Senate following the presentation of the Charter.

The Academic Advisory Committee's recommendations were approved by the Interim Council on the 3rd March 1970, and, following the presentation of the Charter, the Council adopted the Interim Council's approving resolution. The recommended and approved composition of the committees has been adhered to since 1970.

However, there is no evidence that following the presentation of the Charter the Senate itself made any recommendation pursuant to section 13(1)(X) of the Statutes as to the procedure for appointment of staff. It could be inferred from the fact that the existing procedure had been in force for some 12 years before the present case that it had the blessing of the Senate but the fact remains that there was what can only be regarded as a technical breach of the provisions of the Charter.

There was a further complaint that there has apparently been no formal resolution by the Council concerning the composition of an Applications Review Committee, of which there would be one in each school of the University. We see nothing wrong in each school being left to determine the composition of a Committee, which has merely an advisory role, and which could change from time to time depending on the nature of the appointment to be considered.

In the instant case there were changes from time to time in the composition of the Applications Review Committee, and indeed there was a change in the composition of the Appointments Committee, but they were changes made necessary by the circumstances. For example, there was a complaint, at least in the Court below that the Head of Subject had not sat on the Appointments Committee, as he is required to do in accordance with the adopted procedure. The fact was that the Head of Subject was himself an applicant for the post of Reader so obviously a substitute had to be found.

Dr. Sahu Khan's next submission was that the Appointments Committee had acted arbitrarily, and without regard to previous practice, in failing to consider the Appellant's application. In support of the "previous practice" the Appellant gave evidence of three instances where, he said, late applications had been considered. The first concerned a Dr. Omark. The Appellant said that his application was some two months late, but despite that it was considered and he was appointed. However, according to Dr. Baba, Registrar of the University, Omark was offered a temporary appointment on a general application, not in respect to a specific post, which he declined. Dr. Baba recalled the case but could find no file on Omark. The Appellant's second case concerned a Dr. MacCormack, who, in 1978, had made a late application because she had been doing research in South East Asia, and the third example referred to by the Appellant concerned a Dr. Howard but it was clear from the University records that in fact Dr. Howard's application had been within time. The evidence falls well short of establishing a previous practice or custom to the effect that applications would be considered no matter how late they might be. The Appellant, as a member of the School of Sociology, probably had prior notice of the vacancy but in any event it must certainly have come to his attention on the 10th April when the advertisement appeared in the local paper. It then took him four months to make an application, which was five weeks outside the deadline

of the 30th June. The advertisement made it clear that applications were to be received by the Registrar "no later than 30th June", although there was evidence from Dr. Baba that the University prefers to be flexible having regard for the different publication dates when a post is advertised overseas, and applications received two or three weeks after due date are not deemed to be late. A line must be drawn somewhere in fairness to those applicants who make the effort to apply within time and indeed they would have had a legitimate cause for complaint if the Appellant had been appointed. The rejection of the Appellant's application was neither arbitrary nor unfair, and indeed he had the advantage over other late applicants in that his application did go forward to the Appointments Committee when the Registrar would have been justified in rejecting it out of hand. Cullinan J. concluded that the Appellant had the further advantage of seeing the other applications for the post as a member of the Applications Review Committee before he made his own application but we do not propose to express any views on that issue.

We reject Dr. Sahu Khan's submissions on this issue.

Dr. Sahu Khan's final submission concerned the Trial Judge's refusal to exercise his discretion in the Appellant's favour and grant one or more of the declarations sought. This is a summary of Cullinan J's findings:-

1. That there was no requirement that appointments within the University should be gazetted.

2. That there was substantial compliance "with a very vague procedure" by the Applications Review Committee.

3. That the Appointments Committee was properly constituted.

4. That consideration of the Appellant's late application was a matter in the discretion of the Appointments Committee, and it had not been shown that such discretion had been exercised arbitrarily, capriciously or without good faith.

5. That the Senate contrary to the terms of section 13(1)(X) of the Statutes of the University had never made any recommendation concerning the appointment for the post of Reader in Sociology. (Section 13(1)(X) does require a recommendation from Senate for individual appointments).

The last finding might justify the making of declarations one and four as set out earlier in this judgment, but the Trial Judge in the exercise of his discretion declined the declarations with these words:-

" Dr. Sahu Khan submits that in effect the declarations sought will promote the objects of the Royal Charter. I cannot see that this is so, I have expressed my views in the matter; I trust that they shall be sufficient, as far as the University is concerned. I consider it would be clearly inequitable, and indeed contrary to the intent of the Royal Charter, to make any of the five declarations sought, and in the exercise of my discretion I decline to do so."

In reaching that decision the learned Judge relied on two cases, namely Guaranty Trust Co. of New York v. Hannay & Co. [1915] 2 K.B. 536, and Francis v. Kuala Lumpur Councillors [1962] 1 W.L.R. 1411. Having considered them we are inclined to agree with Dr. Sahu Khan that they are not particularly helpful. However, the law on review of exercise of discretion is well settled. Where a Judge has not been shown to have erred in principle his exercise of a discretionary power is not to be interfered with unless the Appellate Court is of the opinion that his conclusion was one which involved injustice. In other words the Appellate Court must be clearly satisfied that the Judge at first instance was wrong. In the present case Cullinan J. based his decision on the grounds that it would be inequitable to grant relief, Dr. Hau'ofa having now held the post of Reader for over three years (the term of the appointment was only for three years with a right of renewal by mutual agreement) and that to do so would be contrary to the intent of the Royal Charter, section 28 of which reads:-

> " Our Royal Will and Pleasure is that this Our Royal Charter shall ever be construed benevolently and in every case most favourably to the University and the promotion of the objects of this Our Charter."

A Court must also be satisfied that a declaration will serve a useful purpose. We do not see how the declarations sought could do that in the circumstances of this case.

We agree that the trial Judge was right in refusing the declaration and we see no merit in the appeal which is dismissed with one set of costs to the Respondents to be fixed by the Registrar.

.....

Judge of Appeal

.....

Judge of Appeal

.....

Judge of Appeal