

IN THE FIJI COURT OF APPEAL  
CIVIL JURISDICTION

CIVIL APPEAL NO. ABU0028 OF 1996  
 (High Court Judicial Review No.11 of 1993)

B E T W E E N

PRAVEEN PRAKASH PALANI  
 and  
FIJI ELECTRICITY AUTHORITY EXECUTIVE  
OFFICERS' ASSOCIATION

Appellants

A N D

FIJI ELECTRICITY AUTHORITY

Respondent

Counsel:

Dr. M. S. Sahu Khan for the Appellants  
 Mr. R. A. Smith for the Respondent

Date and place of hearing: 26 May 1997, Suva

Date of delivery of judgment: 18 July 1997

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J U D G M E N T   O F   T H E   C O U R T

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This is an appeal from the judgment of Lyons J. in the High Court at Lautoka given on the 17 May 1996. The judgment arose out of an application for judicial review made by the appellants seeking, first, orders for certiorari to quash decisions made by the respondent to do what the appellants described as "suspend" him, and later, to dismiss him from its employment; second, a declaration that these actions were ultra vires, null and void; and, third, for an order of prohibition prohibiting it from

continuing with the "suspension" and dismissal. The appellants also sought damages.

In his judgment refusing judicial review Lyons J. canvassed the relevant facts and discussed the law applicable to them. He reached the conclusion that judicial review was not available to the applicants. We note in passing that the learned trial Judge appears to have proceeded in his judgment on the basis that the two applicants stood or fell together. Dr. Sahu Khan in his submissions did not suggest otherwise and we are thus content to proceed on the same basis.

The relevant facts are set out fully enough in the judgment of Lyons J. and it is not necessary for us to repeat them here. A summary will be sufficient for the purposes of this judgment.

The appellant Mr. Palani was employed by the Fiji Electricity Authority ("the Authority") which is a statutory body under the Electricity Act (Cap.180). He had been so employed for some 10 years and for the last four (up to 1993) had held the position of Manager of Management Information Systems. He was a member of the Fiji Electricity Authority Executive Officers' Association ("the Association") which is the second appellant. It is a trade union and Mr. Palani held an executive position with the Association. There was a collective agreement between the Authority and the Association dated the 16 October 1990 and this agreement covered Mr. Palani's employment with the Authority. This agreement was registered under the Trade Disputes Act (Cap.97). He was accordingly employed by the Authority on the terms and conditions contained in the collective agreement. There are two clauses of this agreement which should be set out in full:

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"Clause 2. Management's rights and functions

It is acknowledged that all rights, powers, authority and regular customary functions of Management are vested in the Authority. These functions include the right in their discretion to:

- a) Hire new employees; to promote, transfer or retire officers; to discipline and dismiss officers for cause and causes, but consistent with the rules of natural justice.
- b) Make rules and regulations as the Authority considers necessary or advisable for the orderly, efficient and safe conduct of their business and to require officers to observe such rules and regulations."

"Clause 5. Disciplinary procedures

- a) Employment is conditional on the officer continuing to render satisfactory service.

An officer failing in this respect shall be issued with a written warning by the Chief Executive, after appraisal of his/her performance and agreement reached with the Association.

- b) An officer committing a breach of discipline may have his/her employment terminated or be liable for such lesser penalties upon agreement reached between the Authority and the Association."

It will be noted that cl.2(a) expressly provides that the Authority when exercising disciplinary functions must act in a way that is consistent with natural justice.

It appears that prior to November 1993 an investigation into the Authority appears to have been conducted by the Fiji Intelligence Service. Consequent upon this the Authority decided to hold an internal inquiry into certain aspects of its operations. As a result the Authority sent a letter dated 9th November to Mr. Palani in the following terms:

"Dear Sir

An internal inquiry is being conducted into certain allegations against you and you will be given reasonable opportunity to respond to the Board to the matters raised therein.

This is to advise you that the Board at its meeting on Tuesday, 9 November, 1993 has resolved that you should go on leave, until the end of the inquiry, with immediate effect. This leave will be without loss of any benefit you are currently enjoying.

Please handover any urgent matters needing attention to the General Manager Finance.

(sgd)  
Professor A S Ravuvu  
Chairman"

On the 11 November a press release was issued by the Authority to the effect that certain allegations of administrative and financial mismanagement against the Chief Executive Officer and one or two other senior management staff were discussed by the Board of the Authority and that the Board had decided that the allegations be enquired into, and that officers concerned would be given an opportunity to respond to the findings of the inquiry. It went on to say that the Chief Executive Officer, Mr. John Pirie, and the Manager Information Services, Mr. Palani, had been asked to take immediate leave whilst the allegations were subjected to the internal inquiry. Further, in a separate press release issued by the Authority on the 11 November it was announced that the Board had appointed a Mr. Shyam Narain, a Chartered Accountant of the firm of Messrs. Shyam Narain & Co., "to conduct the enquiry into the allegations of administrative and financial mismanagement". He was to report to the Board of the Authority. In due course he reported to the Board and as a result on the 9 December the Authority wrote to Mr. Palani. The letter, under the hand of the Chairman of the Board, Professor A. Ravuvu, stated that he had been advised previously that he would be given reasonable opportunity to respond to any matters raised in the

internal inquiry so extracts from the report made were enclosed, and he was asked to make any written representations by the 16 December. In effect he was given a week to make his representations. As the learned Judge recorded in his judgment the matters raised related to allegations of applying for and accepting over-payment of wages and travel expenses, misappropriation, granting tenders to a company in which Mr. Palani was alleged to have had an interest, and "back filling" of paperwork. The exact details are not necessary for the purpose of this judgment.

Mr. Palani did not then make written representations but on the 13 December wrote to the Authority requesting certain documents from the Authority to enable him "to successfully defend" his case. The Authority, however, refused this request by a fax dated 15 December 1993. In passing it may be noted that Mr. Palani had in fact prepared an extensive draft reply to the Authority which he had annexed as an exhibit to one of the affidavits he filed (17 October 1994 Exhibit 'M'). However he made another affidavit in which he said the draft reply was just that, a draft intended to be sent which was not sent and, accordingly, he wished to withdraw the letter from the list of documents in the case (10 November 1995 paragraph 2). Notwithstanding this in an even later affidavit, filed in reply to one made by Jagendra Singh on behalf of the Authority dated 21 November 1995, he referred to the draft reply in such a way as to make it plain he was relying upon it as a part of his case. Lyons J. said that in the context of his judgment the draft reply was of little consequence, though he did observe that it showed

Mr. Palani did in fact have time to mount an extensive and well-reasoned reply within the timeframe given him.

Following the fax refusing his request for further documentation Mr. Palani wrote to the Authority on the 15 December 1993 saying that all the allegations against him were denied; that he thought it appropriate to discuss them with his Counsel, Mr. M. S. Sahu Khan, before replying with a detailed explanation but because of the legal vacation Dr. Sahu Khan was overseas and would not be available till mid January 1994. He also said proceedings had already been commenced in the High Court at Lautoka. The Court record in fact shows an application had been filed on the 2 December 1993 seeking leave to apply for judicial review. Mr. Palani concluded his letter by saying that after he had discussed the matter with Dr. Sahu Khan he would "correspond with you in due course". The Authority replied on the 21 December to the effect that it had considered his response to its letter of the 9th December and went on to say:

"The Board believes that your conduct has been incompatible with the faithful discharge of your duties to the Authority and on that ground hereby dismisses you with immediate effect."

Mr. Palani had first sought leave to apply for judicial review in respect of what he called his "suspension" on the 2 December 1993. After his dismissal on the 21 December he made an amended application and what finally came before the Court was contained in his amended statement filed pursuant to Order 53 rule 3 of the Rules of the High Court and dated 22 September 1995. That amended statement seeks judicial review by way of Orders for Certiorari, Declarations, and Orders for Prohibition in respect of the decision by the Authority to suspend and/or dismiss him. A

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variety of grounds were set out in the amended statement but Lyons J. records that Mr. Palani's argument was based on two grounds:

- 1. That he had been denied natural justice in that the time given for reply was insufficient in the circumstances of the case. His request for further time should have been granted.
- 2. That the Authority was biased and that he was thus denied natural justice. This ground was based on two matters:
  - i) A member of the Board of the Authority, a Mrs. Berwick, had been dismissed from her employment by the Authority some years previously and that Mr. Palani had been a party to her dismissal. In result it was alleged she had expressed, and held, some animosity towards him. Mrs. Berwick filed an affidavit in which she disputed much of what was alleged.
  - ii) A Mr. Peter Amey was apparently employed by the Fiji Intelligence Service, which had been involved in a preliminary investigation. Mr. Amey had previously been employed by the Authority and it was alleged he and Mr. Palani had been involved in some disagreement when Mr. Amey had been dismissed. It was alleged Mr. Amey held some animosity towards Mr. Palani.

Lyons J. commenced his judgment by saying that, as acknowledged by Counsel in their submissions, the Court had first to focus on the narrow point of whether or not judicial review was available to Mr. Palani. It would follow that if it was not, then that would be the end of the proceedings; if it was, then the question of whether it should be granted would have to be

determined. This issue of whether or not judicial review was available to Mr. Palani, in these circumstances, is the first matter we consider.

Lyons J., in our view correctly, commenced by saying that judicial review did not lie in a strict master and servant relationship. In our view the law is now clear that judicial review is only available where an issue of public law is involved, in master and servant cases; it does not apply where the issue is a private law obligation. It is not always easy to determine just what is comprehended by the expressions "public law" and "private law" in this area. However, since they first became commonly used judgments of the Courts have developed our understanding of what is meant. In R. v. BBC, ex parte Lavelle (1983) 1 All E.R. 241 Woolf J. at 248 said when dealing with an application for judicial review that nothing in the English rules relating to judicial review had extended the circumstances in which the prerogative remedies of mandamus, prohibition or certiorari were available. He went on to say:

"Those remedies were not previously available to enforce private rights but were what could be described as public law remedies. They were not appropriate, and in my view remain inappropriate remedies, for enforcing breaches of ordinary obligations owed by a master to his servant. An application for judicial review has not and should not be extended to a pure employment situation."

In R. v. East Berkshire Health Authority, ex parte Walsh (1984) 3 All E.R. 425 it was held by the Court of Appeal that whether a dismissal from employment by a public authority was subject to public law remedies depended on whether there were special statutory restrictions on dismissal which underpinned the employee's position and not on the fact of employment by a public

authority per se or the employee's seniority or the interests of the public in the functioning of the authority. Sir John Donaldson M.R. in his judgment discussed the question of statutory underpinning in relation to three of the most well known cases in this area, Vine v. National Dock Labour Board (1956) 3 All E.R. 939, Ridge v. Baldwin (1963) 2 All E.R. 66 and Malloch v. Aberdeen Corp (1971) 2 All E.R. 1278, and said at p.430:

"In all three cases there was a special statutory provision bearing directly on the right of a public authority to dismiss the plaintiff. In Vine's case the employment was under the statutory dock labour scheme and the issue concerned the statutory power to dismiss given by that scheme. In Ridge v. Baldwin the power of dismissal was conferred by statute (s.191(4) of the Municipal Corporations Act 1882). In Malloch's case again it was statutory (s.3 of the Public Schools (Scotland) Teachers Act 1882). As Lord Wilberforce said, it is the existence of these statutory provisions which injects the element of public law necessary in this context to attract the remedies of administrative law. Employment by a public authority does not per se inject any element of public law. Nor does the fact that the employee is in a 'higher grade' or is an 'officer'. This only makes it more likely that there will be special statutory restrictions on dismissal or other underpinning and not the seniority which injects the element of public law. Still less can I find any warrant for equating public law with the interest of the public. If the public through Parliament gives effect to that interest by means of statutory provisions, that is quite different, but the interest of the public per se is not sufficient."

In R. v. Civil Service Appeal Board, ex parte Bruce (1988) 3 All E.R. 686 May L.J. said at p.691:

"The first issue in this case, therefore, is whether the board's decision on the applicant's appeal against his dismissal is capable of challenge in this court by means of judicial review. This will only be if there was a public or administrative element in the board's jurisdiction to hear and decide such an appeal, in other words, whether an issue of public law was involved. The test is relatively simple to state, but by no means easy to apply. As Sir John Donaldson MR said in R. v. Panel on Take-overs and Mergers, ex p Datafin plc [1987] 1 All ER 564 at 577, [1987] QB 815 at 838:

"In all the reports it is possible to find enumerations of factors giving rise to the jurisdiction, but it is a fatal error to regard the presence of all of those

factors as essential or as being exclusive of other factors. Possibly the only essential elements are what can be described as a public element, which can take many different forms ...

Further, the decision of this court in Walsh's case makes it clear that the mere fact that an applicant is employed by a public authority does not of itself inject the necessary element of public law so as to attract the remedies of administrative law or judicial review."

Dr. Sahu Khan submitted that the issue here was not a matter of private law. He argued that the element of public law was present because the Authority is a statutory authority; the second appellant, the Association, is a trade union; the terms and conditions of employment are also governed by the Trade Dispute Act; and the Board of the Authority is appointed under statutory powers. In our view none of these matters injects the necessary element of public law into the master and servant relationship. Walsh's case makes it clear that the mere fact of Mr. Palani being employed by a public statutory authority is not sufficient. The fact that the second appellant is a trade union does not appear to us to bear upon the question and the only relevance of the Trade Disputes Act (Cap.97) appears to be that the collective agreement was registered pursuant to s.34 and thus imported the provisions of the collective agreement into Mr. Palani's contract of employment with the Authority. Further we do not see that the mode of appointment of the Board of the Authority bears upon the question.

Dr. Sahu Khan further submitted that in the past the Courts had approached the question of the public element rather conservatively and suggested that the presence in England of industrial tribunals which administer modern employment protection

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legislation had resulted in judicial review being less readily available. There are no such tribunals nor such legislation in Fiji. He referred, in particular to Walsh's case and comments made by May L.J. to the effect that Courts should not be astute to hold any particular dispute is appropriate for judicial review. We do not think that any question of a generous or liberal approach as opposed to a conservative approach affects the position in this case.

In our view, on the basis so far urged, Mr. Palani was in a strict or pure master and servant employment situation. He was employed by a statutory authority under a private contract of employment. It may be observed, as noted earlier in this judgment, that his contract of employment expressly provided that his employer, the Authority, when exercising disciplinary functions had to act in a way that is consistent with the rules of natural justice. It follows that Mr. Palani, though not entitled to seek judicial review, would be entitled to sue the Authority for breach of contract for failure to observe the rules of natural justice and, if he established his case, to recover damages for that breach. This would relate to both the alleged denial of sufficient time to respond to the matters alleged against him and the allegation of bias.

Dr. Sahu Khan, however, urged a further basis for being entitled to proceed by way of judicial review. He argued that in accordance with the approach adopted by this Court in Manunivavalagi Dalituicama Korovulavula v. Public Service Commission (Civil Appeal No.6 of 1994) he was entitled to judicial review in this case. In Korovulavula's case the appellant had

been appointed to the position of Controller of Road Transport, which was the head of the Road Transport Department. He was a retired civil servant who had previously been head of the Department as Controller of Road Transport. The appointment had not been made to the permanent staff of the public service but it was made in terms of a written contract between the Public Service Commission on behalf of the Government of Fiji and Korovulavula. It was clear, for reasons discussed in the judgment, that Korovulavula held a public office in the Public Service of Fiji. In addition he was later also appointed by the Minister of Transport to the office of Principal Licensing Authority, an office provided for in s.5(1) of the Traffic Act (Cap.176) and was thus charged with licensing motor vehicles and drivers and incidental matters. This appointment was not the subject of a separate contract. Later, because of dissension between him and the Minister, the Minister revoked his appointment as Principal Licensing Authority. Six weeks or so later his appointment as Controller of Road Transport was terminated by notice in writing under a particular clause of the written contract. Korovulavula sought judicial review of these two decisions. This Court dealt with the two decisions separately. There was no contract in relation to the Principal Licensing Authority appointment. The Court held in that case that the Minister had given Korovulavula directions as to how he should carry out his duties that were fundamentally improper and so unlawful; when he refused to carry out those directions his appointment was terminated. Korovulavula clearly held a public appointment to which he had been appointed under an express statutory provision and public law applied to it.

Judicial review was clearly the appropriate procedure. This part of the judgment has no relevance to this case.

The decision relating to the termination of the appointment as Controller of Road Transport was on a somewhat different footing. It was clearly made in accordance with the written contract which provided for termination at the will of either Korovulavula or the Public Service Commission by giving the prescribed notice in writing or by payment of one month's salary, either to or from Korovulavula, in lieu of notice. It was not made under the clause which contained an express provision for dismissal. The Court held that there was no breach of contract, the Commission having acted directly in accord with the terms of the contract. However, the Court went on to say this:

"In our view it is necessary to go further than the express words of the contract in determining whether what was done here by the Commission was proper."

It then went on:

"However, it must be recognised that the Commission had a discretionary power to decide whether it would exercise the rights it had in terms of Clause 6 of the contract to terminate the appointment. Likewise, in the same way the appellant had a discretionary power to decide whether he would exercise the rights he had in terms of Clause 7 of the contract to terminate it. But while the appellant, as a private individual, had the right to decide to exercise those rights for any reason whatsoever, the respondent, being a statutory body created for public purposes, to carry out public functions and to ensure the carrying out of public functions by the Public Service, was required to exercise its rights under the contract in good faith in accord with the general purposes of the statute for the public good."

The Court went on to conclude that the Commission had decided to exercise its power to terminate the contract by notice because of Korovulavula's refusal to carry out the Minister's directions

while Principal Licensing Officer, which the Court had already held were improper and unlawful. Accordingly, the Court held that the Commission had not acted in accord with the general purposes of the statute for the public good in deciding to terminate Korovaluvalu's employment in terms of the contract. Korovaluvalu held a public office, Head of the Transport Department and Controller of Road Transport, in the Fiji Civil Service. That was a matter of public law; judicial review was the appropriate procedure.

Dr. Sahu Khan submitted that His Lordship had in his judgment accepted that the Authority had the power to constitute and conduct an internal inquiry if it found anything amiss in its administration; indeed it had an obligation to the public to do so. He went on to say, among other things, that that decision would be subject to judicial review. Dr. Sahu Khan then submitted that if the decision to set up the inquiry was subject to judicial review then whatever happened under the inquiry should be subject to judicial review.

In our view this submission is not sound. In Korovaluvalu's case the Court held that the earlier decision of the Commission to exercise powers it had under the contract was not made lawfully in that it was not made in good faith in accord with the general purposes of the statute for the public good. It was subject to judicial review on the application of Korovaluvalu. The Court had determined that he held a public office in the Public Service of Fiji and obviously he was the person directly affected by the decision. There was a sufficient public law element involved.

The position here is very different. The decision to constitute and hold an internal inquiry into the Authority's administration would be a decision involving a public law element. The further or additional decision to require Mr. Palani to go on leave, or to suspend him as he describes it, while the inquiry was conducted did not contain a public law element in relation to him. It was a matter of private law between the Authority and an employee. If, as Mr. Palani claims, it was a matter of discipline and was in breach of the rules of natural justice then in terms of his contract he would be entitled to claim damages for breach of contract.

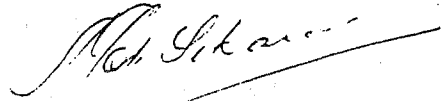
It must be remembered judicial review is not a cause of action. It is a procedure by which a person may apply to the High Court for an order of mandamus, prohibition or certiorari; and if such an application has also been made, and the Court considers it would be just and convenient, it may also grant a declaration and an injunction. It is fundamental, however, that some person must have grounds on which to seek the orders of mandamus certiorari and prohibition. See Order 53. Thus judicial review is not a procedure to be invoked, as it were, in a vacuum. It is no doubt the case that all administrative decisions and discretions of statutory bodies are made or exercised by them are subject to review by the Courts in some circumstances. But anyone who seeks to challenge such a decision or administrative action must establish some ground relevant to the decision or action challenged and have the status to challenge it. In respect of the decision to hold an internal inquiry the learned Judge in the

Court below held that the Authority had acted in good faith and in accord with the general purposes of the Electricity Act. It does not appear to us that the rules of natural justice requiring individuals to be given opportunities to be heard or raising issues of bias have any bearing on the question of the decision to hold an internal inquiry. Mr. Smith, in his submissions, made this point clearly when he pointed out that the appellants were failing to distinguish between the Authority's duty to them as members of the public and its duty to Mr. Palani as an employee. It may well have been that the decision to hold an internal inquiry was open to challenge by way of judicial review if some person could show that he was affected and that he had some ground for challenging the decision, such as that it was ultra vires the statutory powers of the Authority or was otherwise unlawful. No such situation arises in this case. But it certainly does not follow that because the decision to hold an internal inquiry was open to challenge by judicial review, if there was a ground for making such a challenge and someone entitled to make it, that other actions of the Authority consequent upon the decision thereby became open to challenge by judicial review by other persons. Every application for judicial review has to be considered in relation to the particular circumstances applicable to it.

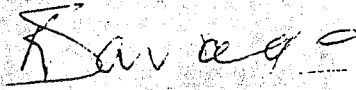
It follows that we reject Dr. Sahu Khan's submission and the appeal fails. We uphold the lower Court's decision to dismiss the application because judicial review is not available in a strict master and servant relationship based on a private contract of

employment. In our view no element of public law was involved.

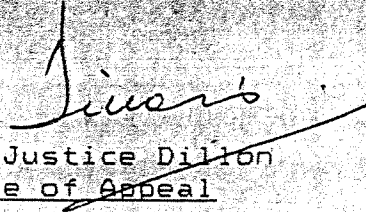
The appeal is dismissed. The respondent is awarded costs.



Sir Moti Tikaram  
President, Court of Appeal



Mr. Justice Savage  
Judge of Appeal



Mr. Justice Dillon  
Judge of Appeal