

IN THE COURT OF APPEAL, FIJI  
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0077 OF 1998S  
(High Court Judicial Review No. 18 of 1997)

**BETWEEN:**

PUBLIC SERVICE COMMISSION  
ATTORNEY-GENERAL OF FIJI

*Appellants*

**AND:**

SASHI MAHENDRA LOCHAN  
E/N JAGRUP

*Respondent*

**Coram:**

The Hon. Sir Moti Tikaram, President  
The Rt. Hon. Sir Thomas Eichelbaum, Justice of Appeal  
The Hon. Justice Kenneth R. Handley, Justice of Appeal

**Hearing:**

Friday, 6 August 1999, Suva

**Counsel:**

Mr. D. Singh for the Appellants  
Mr. S. Chandra for the Respondent

**Date of Judgment:** Friday, 13 August 1999

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JUDGMENT OF THE COURT

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From 1993, the respondent had held the position of Assistant Registrar of Titles. By letter dated 26 March 1997 the Public Service Commission (PSC) purported to confirm the "immediate posting" of the respondent to the Ministry of Youth, Employment Opportunities and Sports. The respondent commenced proceedings, seeking leave to apply for judicial review challenging the validity of the PSC's action. The High Court granted leave on a single point of law, namely whether the PSC had any power to transfer or post the respondent to the Ministry, or whether that power was conferred only on the Judicial and Legal Services Commission (JLSC) as it was then

called. On the substantive hearing, founding itself on sections 124 and 127 of the 1990 Constitution, the Court held the PSC did not have any power to transfer or post the respondent as it did, and granted judicial review. Against that judgment, the PSC and the Attorney General have appealed to this Court.

Section 124(1) of the 1990 Constitution vested in the JLSC the power to make appointments to certain offices, and to remove and exercise disciplinary control over persons holding such appointments. It has been common ground that the offices in question included the position of Assistant Registrar of Titles. Section 127 vested in the PSC the power to make appointments to public offices, and to remove and exercise disciplinary control over persons holding such appointments, with certain exceptions. A relevant exception, under section 127(4)(d), was any office where the power of appointment was within the functions of the JLSC. The essence of the High Court's reasoning was that the power to appoint and remove must by implication include the power to transfer or post temporarily. Nothing in section 127, the judgment stated, gave the appellant any power to transfer or even temporarily post any employee who had been appointed by the Judicial and Legal Services Commission.

Before coming to the substance of the case we need to address two preliminary issues. At the outset we were informed that with effect from 19 July 1999, the respondent had been reinstated to his former position. Mr. Singh told us that however this was pursuant to the order made in the court below, and was without prejudice to the appellants' future decisions, should the appeal succeed. We saw no reason why this

event should preclude the hearing of the appeal, which proceeded accordingly.

The second matter, raised by the Court itself, related to s.195(2)(h) of the 1997 Constitution dealing with the repeal of the 1990 Constitution:

*“All proceedings in the courts established by the Constitution of 1990 that had commenced before that repeal but had not been determined continue, on and after that repeal, as if the provisions of this Constitution were in force at their commencement.”*

We drew attention to this provision because as noted in the judgment under appeal, the relevant provisions of the current Constitution differ from those of its predecessor. However, we are satisfied this case has to be decided under the 1990 provisions, which were in force at the time the events occurred. Section 195(2) (h) is retrospective only to the extent of deeming the 1997 Constitution to be in force at the later point of time when the proceedings were commenced.

The appellants rely on Section 154(1) of the 1990 Constitution :

*“References in this Constitution to the power to remove a public officer from his office shall be construed as including references to any power conferred by any law to require or permit that officer to retire from the Public Service and to any power or right to terminate a contract on which a person is employed as a public officer and to determine whether any such contract shall or shall not be renewed.....”*

In the appellants' submission, "remove" connotes cessation of employment; and, so the appellants argue, this construction is strengthened by the contents of s.154(1). They submit the respondent was not removed, or even transferred; he was merely "posted". According to the Public Service Commission (Constitution) Regulations 1990 (Reg. 19(1)), the expression "transfer" does not include the posting of an officer between posts within the same Ministry or Department, or the transfer of an officer in the common user class from one Ministry or Department to another. However, if the High Court's construction of the relevant provisions of the 1990 Constitution is correct, namely that the power to appoint and remove includes the power to transfer or post temporarily, the regulations on which the appellants rely, being subordinate legislation, cannot affect that construction.

It is convenient to note here the appellants' submission that the reference in s.124(1) to the JLSC's power "to remove *and* to exercise disciplinary control" ought to be read cumulatively, and had no application to a situation involving removal alone. Quite apart from the fact that the PSC's actions clearly had disciplinary overtones, as a matter of construction we do not agree with the submission. Reference to s.154 shows that removal includes retirement, ordinarily not a step involving disciplinary control. Further, if the appellants' contention was correct there would be no provision for removal in the case of incapacity to act, for example because of ill health. So we think it is clear the references to "removal" and to "disciplinary control" ought to be read disjunctively.

The critical question, in our opinion, is whether the respondent was removed from his position as Assistant Registrar. If so, since only the JLSC had the power to take that step, it must follow that the PSC's action was invalid.

Removal from an appointment connotes that the power to carry out the duties pertaining to the position has been taken from the appointee, in more than a transient sense. If the "posting" or "transfer" of a JLSC appointee had that result we agree with the High Court this was beyond the power of the PSC. In the respondent's case the facts leave no room for doubt that this was the outcome. In the appellants' affidavits it was contended that the respondent's "posting" to another Department had been a "temporary" one. The deponent stated the temporary posting was necessary for purposes of an investigation into alleged malpractices in the Titles Office. It was said that on a favorable outcome of the investigation, the respondent would return to his previous position. However, before the Court was an extract from the Republic Gazette dated 7 April 1997, stating that the respondent's appointment had been revoked, and announcing the name of his successor. (Mr. Singh made no point of the Gazette Notice referring to the position of "Deputy" Registrar rather than "Assistant," Deputy Registrar, we understand being the pre-1990 description of the same position.) Plainly, after 26 March 1997 the respondent could not carry out the duties of Assistant Registrar, and there was no assurance as to when, if ever, he would be allowed to do so. There is a degree of analogy with the "indefinite suspension" of the Judge of the High Court of Trinidad and Tobago in *Rees v. Crane* [1994] 1 AC 173, 188 which the Privy Council held was outside the administrative powers of the Chief Justice. Here, in the event the respondent was

kept out of his position for over two years, thus diminishing his opportunities of adding to his experience and enhancing his career prospects. Thus we are unable to accept the appellants' contention that the respondent was not "removed" from his position. Whatever the appellants' intentions regarding the respondent's future employment, we cannot escape the conclusion that his position as Assistant Registrar had been terminated.

The appellants have also referred to Reg. 39(1) of the Public Service Commission (Constitution) Regulations, authorising the PSC to transfer an officer to other duties when the PSC becomes aware of any act of indiscipline or misconduct. However, we agree with the High Court that suspicions or allegations of misconduct are insufficient to justify the invocation of this regulation. Further, as noted earlier the regulations cannot override the Constitution. This also disposes of the appellants' reliance on the General Orders of the Public Service Commission.

The appeal therefore fails and is dismissed. We do not accept the respondent's submission that the appellants' contentions were so unsustainable as to amount to a misuse of the court process. Although we have reached a clear view that the respondent was invalidly removed, we can understand the appellants' wish to have the respective roles of the JLSC and the PSC clarified. Accordingly we decline to award solicitor and client costs. We allow the respondent costs against the appellants of \$1,000.00 inclusive of any disbursements.

**Orders:**

Appeal dismissed.

Respondent awarded \$1,000.00 costs inclusive of disbursements.

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**Sir Moti Tikaram**  
**President**

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**Sir Thomas Eichelbaum**  
**Justice of Appeal**



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**Justice Kenneth R. Handley**  
**Justice of Appeal**

**Solicitors:**

Office of the Attorney-General Chambers, Suva for the Appellants  
Messrs. Maharaj Chandra and Associates, Suva for the Respondent