

IN THE COURT OF APPEAL, FIJI AT SUVA

CIVIL APPEAL ABU0060 OF 2001S

(High Court Judicial Review No. HBJ 0031 of 2000)

BETWEEN:

ANURADHA CHARAN

Applicant

AND:

PUBLIC SERVICE COMMISSION

Respondent

APPLICATION FOR LEAVE TO APPEAL OUT OF TIME

In this matter the applicant seeks an order from this court permitting her to file an appeal out of time. The appeal which the applicant wishes to bring is from a judgment of Byrne J. dated 23 August 2001 entered on 24 August 2001.

The application is supported by an affidavit of the applicant sworn on 22 October 2001. In the affidavit she says that she "was confused with the previous decision of this court" about whether she should seek leave of the court to appeal before actually lodging an appeal. She said that immediately after delivery of his decision on 23 August 2001 Byrne J. proceeded on leave. The applicant asserts that her application could not be made apparently until after Byrne J. returned from leave. Whether this is correct or not is not a matter of substantial importance because the amount of time which has elapsed in this case is comparatively short. In her affidavit the applicant referred to another case in which Scott J. had said that no leave

was required to file an appeal on the dismissal of an application for judicial review. The applicant said that she had prepared her appeal but had overlooked filing it in time by seven days. Her uncontested evidence was that the respondent was informed through its counsel of her intention to appeal against the decision particularly on the ground that Byrne J. had failed fully to consider her application.

I was told during the hearing of the application that the applicant was not seven days out of time but fifteen days out of time. In my opinion, in the circumstances of this case nothing particularly turns on this.

The applicant has been a long time member of the Fiji Public Service. Until certain legislation came into force in 1987, she expected that her retirement age would be 60 years of age. In his judgment Byrne J. helpfully lists legislation dealing with the question of the retirement age of members of the Public Service since 1987. I do not repeat the list here but it shows that there were two decrees in 1987 two in 1988, certain provisions of the 1990 Constitution, a further decree in 1990 and certain regulations also made in 1990. Also of relevance were the Constitution (Amendment) Act 1997 s.147(1) and s.194(5) and regulation 14(1) of the Public Service Regulations 1999.

Having recited this list of the various legislative instruments which applied to the situation, his Lordship said that, in his judgment, this chronology of the relevant law put it beyond any doubt that the compulsory retirement age in the Public Service as far as the applicant was concerned was 55 subject to any special circumstances which gave the Commission the power to extend that age to 60. His Lordship said that in his judgment the

right to retire at 60 only accrued to or was only acquired by a person who had actually turned 60 at the date of commencement of the amendment. He said that this was made clear by s.48 of the Pensions Act 1983 and also the provisions of the 1990 and 1997 Constitutions. His Lordship said that it was his view that the applicant was deemed to have retired at a time when the retirement age was 55 years. He added, "Thus in my view she cannot argue that the right to receive Pension benefits and to retire at 60 had already been acquired by her". His Lordship also considered that there was a contractual aspect which made it clear that the applicant had to face the fact that she was to retire when she attained the age of 55 years.

In my view it is relevant for a court dealing with an application of this kind to consider whether or not there is ground for the view that the applicant has an arguable case. It is a long standing principle of the law relating to the construction of statutes that statutes affecting accrued rights and entitlements will not be construed retrospectively unless Parliament has manifested a clear intention that this should be the case. In the present case it can be said that the applicant's accrued rights are affected because she had, up to the time of the amending legislation, an entitlement to remain in the Public Service until she attained the age of 60 years.

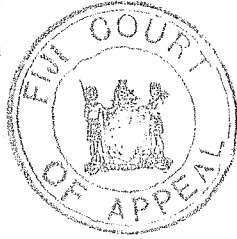
I have not considered the various pieces of legislation to which I have referred and it would not be appropriate for me, in any event, to express even a tentative view on the applicant's prospects of success. I have formed no such view but I am prepared to say that because of the principle of statutory construction to which I have referred that the applicant has an arguable case.

That leaves the question whether her application for leave to appeal out of time should be refused on the ground that there has been undue delay in making it. I propose to assume that the delay is fifteen days. It may be less but it is certainly no more. In the run of the argument references were made by both sides to cases decided in the context of other facts and circumstances and of periods of time that were held to be not too long even though they involved periods of months and periods which were said to be unduly long even though they involved periods of only a few days. The lesson in this is that each of these cases involves the exercise by a Judge of a discretion upon the basis of the facts and circumstances which a particular case throws up. That is why Judges repeatedly say that cases on the exercise of discretions of this kind are not helpful unless they deal with matters of principle. I repeat that statement here.

In my opinion the applicant has given, in her affidavit, a not unreasonable explanation as to why she was late in filing the application for leave to appeal out of time. There is, as I have concluded, an arguable case. The matter is of importance to the applicant and may also be of importance to others in the Public Service in a like position. In all those circumstances I think it appropriate that leave to appeal out of time should be granted. I extend the period for filing the notice of appeal up to and including 30 November 2001.

In accordance with usual practice, the applicant must pay the costs of the application which I assess at \$100.00.

Dated at Suva this 20 November 2001.



Ian F. Sheppard

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Ian F. Sheppard
Justice of Appeal