

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

MISC.5 OF 2004S

BETWEEN:

COLONIAL NATIONAL BANK

APPELLANT

AND:

ARBITRATION TRIBUNAL AND OTHERS

RESPONDENT

Counsel:1 Mr. Nagin for applicant
Mr. Udit for first respondent
Mr. Shankar for third respondent

Hearing: Hearing 18th August and 1st October 2004

Ruling: 4 October 2004

R U L I N G

A dispute between the applicant Bank and the second respondent Union arising from the dismissal of the third respondent by the Bank on the grounds of sexual harassment was referred to the Arbitration Tribunal. On 16 August 2002, the Tribunal held the dismissal of the third respondent was unjustified and directed that he be paid three months salary. No order for reinstatement was requested or made.

On 25 June 2003, the Bank applied to the High Court for leave to apply for judicial review seeking an order of certiorari to remove and quash the order of the Tribunal and a declaration that the Tribunal had made errors of law.

Although there had been a very substantial delay and, as far as the application for certiorari was concerned, the application was lodged over seven months after the time

allowed by O53 r 4 (2), there was no mention in the notice of motion of the need to seek leave to apply out of time although there was an affidavit in support (although that also was not referred to in the notice) the penultimate paragraph of which stated:

“12. I also pray that time be extended to file and proceed with this Judicial Review. The third Respondent has also filed a Judicial Review No. 1 of 2003 seeking to review the said Arbitration Award No 32 of 2002 and that Judicial Review is pending before this Honourable Court. I am advised and verily believe that both the Judicial Review actions should be consolidated.”

The application for leave came before Pathik J who accepted it as an application both for extension of time and for leave. In his judgment on 31 October 2003, he pointed out:

“This is an application for leave to file judicial review of the said award. This has been filed out of time, that is, a delay of over 7 months.

Nowhere in the papers before me is there any explanation, why there has been such a considerable delay in making the application.

Before one can consider the granting of leave for judicial review the applicant has to overcome the first hurdle and that is to convince the court that the reason for delay was justifiable. This the applicant has failed to do.”

He refused the application. Whilst he states that “leave to file for judicial review is refused”, it appears his refusal was of the application to enlarge time and therefore, as he states later, “In view of this refusal it is not necessary to consider the ‘leave’ aspect of the application.”

On 1 December 2003, the Bank filed an application for leave to appeal on the basis that it was an interlocutory decision. It was refused by the same judge. In his Decision he clarified his earlier order:

“My decision relates to refusing leave to apply for judicial review **out of time** for the reasons I gave and **not** refusal of leave to apply for judicial review. ... Leave must be

obtained as provided under O 53 ... but that did not arise because I had refused leave to apply out of time.”

That decision was delivered on 19 July 2004 and, on 6 August 2004, the Bank filed an application to this Court for leave to appeal the decision of Pathik J made on 31 October 2003, leave to appeal out of time and a stay of all proceedings including Judicial Review No 1 of 2003.

The application came before me as a single judge of appeal on 18 August 2004 but counsel for the respondent sought time to file written submissions. I now have them and submissions in reply by the applicant.

As I have stated, the application for leave to appeal was made on the basis that the refusal of leave to extend time was an interlocutory matter. However, in the recent decision of Jetpatcher Works (Fiji) Ltd v The Permanent Secretary for Works and Energy and others, No ABU 0063 of 2003 delivered on 16 July 2004, this Court adopted the ‘order approach’ in determining whether a decision is interlocutory. Applying that approach, counsel agree that the refusal to extend time was a final order and so leave is not required. The court is, therefore, only considering an application to allow the appeal to be brought out of time and, if successful, for a stay of execution pending the appeal.

It is necessary to pause at this point to consider which period of time the application is seeking to extend.

The appeal for which it is sought to extend the period is from the refusal of Pathik J to extend the time to seek leave to apply for judicial review, namely his decision of 31 October 2003.

However, the learned judge’s Decision of 19 July 2004 states that grounds of appeal from that decision were filed on 21 November 2003. The application of 1 December 2003 was for leave to appeal on the basis that the order of 31 October 2003 was interlocutory which is now accepted to have been incorrect and leave is not required.

Section 20 (1) (b) allows a single judge of appeal to extend the time within which a notice of appeal may be given and rule 16 of the Court of Appeal Rules provides:

“16. Subject to the provisions of this rule, every notice of appeal shall be filed ... within the following period (calculated from the date on which the judgment or order of the Court below was signed, entered or otherwise perfected), that is to say –

(a) in the case of an appeal from an interlocutory order, 21 days;

(b) in any other case, 6 weeks.”

In the present case, once the mistaken need for leave is removed, the application is to extend the time to appeal the order to 31 October 2003 and, as a final order, that notice had to be filed within 6 weeks.

The statement referred to above in the learned judge’s Decision of 19 July 2004 that grounds of appeal were filed on 21 November 2003 would mean they had been filed within time and so this application would be unnecessary.

I asked counsel to clarify that issue and am grateful to them for their assistance. It appears that those grounds were only *dated* 21 November 2003. They were not *filed* but were attached to the application of 1 December 2003. Once the application for leave to appeal was refused, the applicant did not file them and, instead, sought this Court’s leave to appeal and to appeal out of time.

Clearly therefore, the nature of the appeal has been before the parties since a date which would have been within time and counsel for the respondent’s take the reasonable position of accepting that the application to extend time should be allowed.

I therefore grant leave to file grounds of appeal out of time and order that they shall be filed within 7 days.

That leaves the application for a stay of execution which is refused for the following reasons.

There is no right of appeal from a decision of the Tribunal. There is always a right to apply for judicial review as has been done here but a very brief perusal of the grounds advanced for review shows it is clearly being sought simply as a means to circumvent the lack of right of appeal.

Nowhere is there any challenge to the procedure or manner in which the Tribunal determined the case. The declaration sought is stated to be on the ground that the "Tribunal has made errors of law on the face of the record" but, although each ground is prefaced with the suggestion that the Tribunal erred in law, they simply challenge the findings of fact. Nowhere is there any reference to any of the recognised grounds for judicial review. They simply challenge the merits of the decision itself and, as such, are unlikely to result in leave being granted.

That ground alone is sufficient for the Court to refuse a stay but it goes further. This case has been the subject of considerable delay by the applicant. The application to stay the Tribunal's decision presumably means that the third respondent has not yet been paid the money awarded by the Tribunal. By failing to do so, the applicant has effectively granted itself a stay and I consider it unconscionable that the third respondent has been kept out of his remedy for such a long time as a result.

The application for a stay is refused.

Thus the order is:

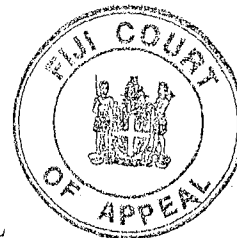
1. leave to appeal out of time granted;
2. grounds of appeal to be filed within 7 days;
3. application for a stay of execution refused.



[GORDON WARD]

President

FIJI COURT OF APPEAL



4TH OCTOBER, 2004

SOLICITORS:

Sherani & Co., Barristers & Solicitors, 2nd Floor, Harifam Centre Greig Street,
SUVA

Solicitor General, Attorney General's Office, SUVA

G.P. Shankar & Co., Solicitors, BA