

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

CIVIL APPEAL NO. ABU0071 of 2004S  
 (High Court Judicial Review No. HBJ23 of 2003S)

BETWEEN:

COLONIAL NATIONAL BANK

*Appellant*

AND:

ARBITRATION TRIBUNAL

*First Respondent*

FIJI BANK AND FINANCE SECTOR  
EMPLOYEES UNION

*Second Respondent*

RAJESHWAR SINGH

*Third Respondent*

Coram:

Eichelbaum, JA  
 Gallen, JA  
 Scott, JA

Hearing:

Monday, 25 July 2005, Suva

Counsel:

Mr H. Nagin for the Appellant  
 Ms N. Karan for the First Respondent  
 (abides by decision of court; leave to withdraw)  
 Mr G.P. Shankar for the Third Respondent

Date of Judgment: Friday, 29 July 2005, Suva

---

**JUDGMENT OF THE COURT**

---

- [1] On or about 1 December 1999 the appellant, Colonial Mutual Life terminated the employment of the third respondent, Rajeshwar Singh on grounds of allegations of sexual harassment. His Union, the second respondent, reported a trade dispute in respect of the termination to the Permanent Secretary of Labour, and in due course that dispute reached the Arbitration Tribunal, which delivered an Award on 16 August 2002. The Tribunal held that the third respondent's actions, although "despicable and inappropriate", could not be described as sexual harassment.

Finding that his dismissal was unjustified, the Tribunal awarded him three months salary as compensation.

- [2] In proceedings commenced on 25 June 2003, the appellant sought leave to apply for judicial review of the award, maintaining that the Tribunal made a number of errors of law, principally in holding that the third respondent's actions did not amount to sexual harassment. The relief intended to be sought in the proceedings included an order of certiorari to remove the award into the Court and quash it, and a declaration that in its award, the Tribunal had made errors of law on the face of the record.
- [3] The application came before Pathik J who declined to grant leave. The Judge's conclusion related solely to the delay in applying, which he said was far too long and had had a prejudicial effect on the persons concerned. He did not address the other aspects relevant to the grant of leave. The appellant now appeals to this Court.
- [4] Judicial review is governed by O53 of the High Court Rules. Rule 3 provides that no application for review is to be made unless leave has been obtained. Rule 4 provides:

*(1) Subject to the provisions of this rule, where in any case the Court considers that there has been undue delay in making an application for judicial review or, in a case to which paragraph (2) applies, the application for leave under rule 3 is made after the relevant period has expired, the Court may refuse to grant –*

- (a) leave for the making of the application, or*
- (b) any relief sought on the application,*

*if, in the opinion of the Court, the granting of the relief sought would be likely cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.*

In certiorari, the "relevant period" is three months.

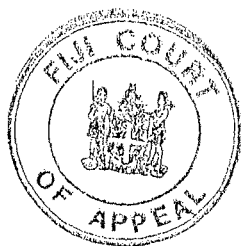
- [5] In *Harikisun Ltd v DIP Singh & ors* Civil Appeal ABU0019 of 1995S, 4 October 1996 this Court held that the words following sub-paragraph (b), "if in the opinion of the Court the granting of the relief sought would be likely to cause substantial hardship ...." apply to sub-paragraph (b) only. In the absence of argument we express no opinion as to the correctness of that conclusion. In the present case it makes no difference whether the discretion is regarded as completely unfettered, or whether the matters which (in terms of *Harikisun*) are applicable to sub-paragraph (b) are to be seen as governing the exercise of the discretion. The Judge proceeded on the latter basis.
- [6] While, obviously, the application was made well in excess of 3 months after the award, and there was a finding of prejudice, the Judge did not state in what respect there had been, in his words, "a prejudicial effect on the persons or parties affected". The person principally affected, one would assume, was the third respondent.
- [7] As the Judge noted, the appellant did not attempt to explain the delay, at least not directly. The Judge stated that in cases of delay, the first hurdle for the applicant was to convince the court that the delay was justifiable. We agree that normally, an applicant would be expected to provide a credible explanation of the delay.
- [8] In this case, there was a special feature. The third respondent has himself taken judicial review proceedings in respect of the Tribunal's award. His proceedings antedated the appellant's, being commenced in January 2003, some 5 months after the date of the award. The third respondent's complaint is that the Tribunal did not afford him the right to be heard before deciding on the compensation to be awarded. The third respondent has been granted leave to bring the application.
- [9] Although evidence of the third respondent's application was before the High Court, and the appellant's submissions drew attention to it, the Judge did not refer to this aspect in his reasons for declining the application for leave.

- [10] The decision on an application of the present kind involves the exercise of a judicial discretion, leading to the usual limitations on the circumstances in which an appellate court may intervene. The fact that the third respondent had been granted leave to challenge an aspect of the same award was a significant point. It was, indeed, the only factor relied on by the appellant to overcome the delay in bringing proceedings. Since the Judge did not take a significant consideration into account, this Court is able to set the Judge's decision aside and re-examine both the delay issue and the merits of the application.
- [11] We first consider the question of delay. There is force in the third respondent's contention that the appellant should have given a fuller explanation. We were told from the bar that the appellant learned of the third respondent's application in March 2003. Even then, three months went by before the appellant filed its papers. However, the third respondent had allowed five months to elapse before commencing his own proceedings challenging the award, yet was given leave. We consider that the circumstance of the third respondent's own proceedings is sufficient to overcome any effect which the appellant's delay might have otherwise. It would be contrary to justice if the third respondent was able to have aspects of the award reviewed while the appellant was denied that privilege. In the circumstances we do not see that the third respondent can complain of prejudice; and no other party or person is adversely affected.
- [12] As to the merits, normally these should not be examined in depth at this stage. In regard to many of the grounds raised we agree with the remarks of the President in his interlocutory ruling (*Colonial National Bank v Arbitration Tribunal & ors*, Misc 5 of 2004S, 4 October 2004) that the appellant is attempting to challenge the Tribunal's ruling on issues of fact. However, the grounds relating to the applicability of substantive justification, and reversal of the onus of proof, at least, raise arguable questions of law.

[13] Accordingly we propose to allow the appeal and grant the leave sought. We also direct that the grant of leave will operate as a stay of proceedings on the award. Further, that the application for judicial review be heard together with the third respondent's application for review of the same award under Judicial Review No. 1 of 2002.

### Orders

1. Appeal allowed, application for leave to apply for judicial review granted;
2. Direct that the grant of leave will operate as a stay of proceedings on the award of the Arbitration Tribunal No 32 of 2002 dated 16 August 2002;
3. Appellant's application for judicial review to be heard together with the third respondent's application for review of the same award under Judicial Review No. 1 of 2002;
4. As the appellant had to seek an indulgence to overcome the delay, no order for costs.



*Proton Eichelbaum*  
 \_\_\_\_\_  
 Eichelbaum, JA

*BA Gallen*  
 \_\_\_\_\_  
 Gallen, JA

*JA Scott*  
 \_\_\_\_\_  
 Scott, JA

### Solicitors:

Messrs. Sherani and Company, Suva for the Appellant  
 Office of the Attorney General, Suva for the First Respondent  
 Messrs. G.P. Shankar and Company, Ba for the Third Respondent