

IN THE HIGH COURT OF FIJI  
AT SUVA

CIVIL JURISDICTION

JUDICIAL REVIEW NO.: HBJ 42 OF 2001

BETWEEN:

DILDAR SHAH

*Applicant*

AND:

FIJI ISLANDS REVENUE AND CUSTOMS AUTHORITY

*First Respondent*

AND:

FIJI PUBLIC SERVICE COMMISSION

*Second Respondent*

AND:

THE ATTORNEY-GENERAL OF FIJI

*Third Respondent*

Counsel: Mr. S. Chandra – for the Applicant  
Mr. J. Apted – for 1<sup>st</sup> Respondent  
Mr. L. Daunivalu – for 2<sup>nd</sup> & 3<sup>rd</sup> Respondents

Date of Hearing: Thursday 2<sup>nd</sup> November, 2006

Date of Judgment: Friday 10<sup>th</sup> November, 2006

## **JUDGMENT**

### Introduction

[1] By an amended notice of motion dated the 30<sup>th</sup> of June, 2006 Dildar Shah (“the applicant”) moves for judicial review against the Fiji Islands Revenue and Customs Authority (“FIRCA”), the Public Service Commission (“PSC”) and the Attorney-General

("AG"). As originally filed this third amended notice of motion wrongly contained a challenge to FIRCA's decision to suspend Mr. Shah (paragraph 1(b)).

- [2] The applicant's counsel withdrew this decision from review. I have for the purposes of this judgment put those considerations to one side.

### **Facts**

- [3] The judicial review relates to the creation of FIRCA and its transformation from a Government service to a statutory entity.
- [4] FIRCA was established by the Fiji Islands Revenue and Customs Authority Act 1998 ("The Act") as its name suggests FIRCA combined the functions of the former Inland Revenue Department and the Customs and Excise Department of the Government.
- [5] As a statutory authority FIRCA is completely independent of the Public Service Commission. FIRCA began to exercise the functions of the two former departments on the 1<sup>st</sup> of January 1999 although its board had begun to operate prior to that date.
- [6] This judicial review relates to the termination of the applicant's employment with FIRCA some months after his transfer to the statutory authority and a subsequent decision not to reinstate him.
- [7] The applicant joined the Public Service in March of 1977. Some 21 years later he had risen to the position of Chief Administrative Officer with the Department of Customs and Excise. As a result of the establishment of the Fiji Islands Revenue and Customs Authority ("FIRCA") in 1998 the applicant received a letter from the Secretary of the Public Service Commission advising him that his position in the Public Service was to terminate on the 1<sup>st</sup> of January 1999 and thereafter he was to work with the newly established FIRCA.
- [8] Mr. Shah stayed with FIRCA for some three months when on the 29<sup>th</sup> of March 1999 he was advised by his employer that his designated post of Chief Administrative Officer had been abolished. He was told re-deployment was considered to another job and that regard had been had to his service and experience but regrettably there were no suitable

vacancies for which he could be considered. He was made redundant. He was sent a cheque by way of redundancy payment amounting to some \$38,319.23.

- [9] The applicant first accepted then rejected the redundancy. He returned the cheque and asked for higher compensation. He threatened legal action. While this issue was being resolved a complaint of serious misconduct was received against the applicant. This complaint had been referred to the police. During the course of the police investigation it was thought proper by FIRCA that the applicant be suspended from his duty on full salary. Accordingly, FIRCA withdrew the redundancy offer.
- [10] Although the applicant contended that the two events were clearly linked I could find no satisfactory evidence to enable that conclusion to be properly drawn. These disciplinary procedures did, however, have the effect of swaying the applicant's decision back towards accepting the originally offered redundancy even although it had by then been withdrawn. He wrote to FIRCA seeking redundancy on the 9<sup>th</sup> of May. FIRCA accepted that.
- [11] He was paid his redundancy on the 12<sup>th</sup> of May 1999. As at that date his salary stopped. He was then no longer working for FIRCA. I accept the inference that FIRCA then stopped its internal investigation into the disciplinary matter. The police investigation continued.
- [12] The investigation into the allegations of misconduct against the applicant took 2½ years to resolve. The applicant was advised on the 16<sup>th</sup> of November 2001 by the Acting Commissioner of Police that the Director of Public Prosecutions advised against any charges being laid. The investigation was closed.
- [13] Thereafter the applicant sought reinstatement with FIRCA and vigorously renewed his calls for the redundancy decision to be re-considered.
- [14] On the 7<sup>th</sup> of December 2001 the Authority rejected the applicant's request for reinstatement.

- [15] He accordingly made an application for leave to apply for judicial review on the 19<sup>th</sup> of December 2001. The lengthy curial history is detailed in an earlier judgment.
- [16] In addition, between 1999 and December 2001 the applicant attempted to have himself taken back into the Public Service. He sent letters to the second respondent complaining about the manner in which he had been made redundant by FIRCA so soon after he had been transferred from the Public Service. He thought it only just in the circumstances that the Public Service re-employ him.
- [17] The Public Service Commission refused to accept his request for reinstatement. They were joined into these original proceedings.
- [18] As a civil servant the applicant was under the control of the PSC and his terms and conditions of employment were contained in the relevant Public Service Legislation.
- [19] When the new statutory agency was created the PSC directed FIRCA to accept the transfer of all but two staff of the former Customs and Tax Departments. The transfer of all employees is referred to in an earlier provisional judgment on this matter by his Honour Justice Scott (page 40 agreed bundle of documents).
- [20] In that decision his honour Justice Scott commented that the redundancy policy for the Public Service issued on the 15<sup>th</sup> of October 1996 formed part of the applicant's terms and conditions of employment at FIRCA. For the purposes of this judgment I respectfully concur with his honour's view.
- [21] At page 4 Justice Scott went on to say that paragraphs 3, 3.2 and 3.3 of the policy meant that an "officer" could only be "declared redundant" if sub-paragraphs (a), (b) and (c) of paragraph 3.2 could not be complied with. However, in my view these provisions could only apply "mutatis mutandis" since they were designed for application by the PSC prior to corporatization not a statutory corporation after corporatization.

### The Law

- [22] I propose to first address a preliminary issue that affects the entire proceeding. Does the applicant have a public law claim?
- [23] FIRCA argues that the application is hopeless as it concerns matters of private not public law.
- [24] I have formed a clear view that from the moment the PSC decided to divest itself of these government departments it set up a process whereby the former government servants once transferred would be under an employment contract with the new statutory authority. I have formed this view based on Sections 17,18,19 and 21 of the Act.
- [25] In my view these provisions make it clear that from the transfer date the applicant had a contract of employment with FIRCA. The purpose of those sections was to ensure that in assessing the entitlements of a transferred employee their eventual contract of employment would be interpreted in such a way as to guarantee the employee's period of service and not have it lost to them.
- [26] I accept the first respondent's submission at page 13 of the written submissions, paragraph 5.5, that if that was not the correct position then transferred employees would lose the benefits of continuous service at transfer. That cannot have been the legislative intent.
- [27] I further accept the submission that these sections suggest that the transferred government servants had pre-existing employment contracts with the Public Service. That reflects the current trend in common law that view public servants as contracting with government departments and not serving them at pleasure.
- [28] The law in Fiji as well as in other Commonwealth jurisdictions has done much to establish a relative equality of legal position as between the State and those who work with it. As was observed in *Wales v Newfoundland* [1999] 3 S.C.R. 199 by the Canadian Supreme Court at paragraph 22 of the judgment by His Honour Justice Major:

*"a common sense view of what it means to work for the government suggests that these relationships have all the whole marks of contract.*

*There are negotiations leading to agreement and employment. This gives rise to enforceable obligations on both sides. The Crown is acting much as an ordinary citizen would engaging in mutually beneficial commercial relations with individual and corporate actors. Although the Crown may have statutory guidelines the result is the contract of employment”.*

- [29] It is time in Fiji to dispel the anachronism that a civil servant’s position is that of feudal servitude under a monarch’s patronage when in reality the State now contracts a public servant’s employment.
- [30] The English Courts have also been prepared to hold that contracts exist between the Crown and its servants (*CR v BBC X.P.Lavelle* [1983] 1 WLR 23, *R v Lord Chancellor’s Department X.P.Nagle* [1992] 1 ALL ER 897 and *R v Derbyshire CCX.P Novelle* [1998 CR 808).
- [31] The issue then arises as to whether the applicant’s rights are limited to private law remedies that exclude judicial review.
- [32] In the case of *Pravin Palani & Another v The Fiji Electricity Authority*, Civil Appeal No. ABU0028 of 1996 the Fiji Court of Appeal upheld a decision of Justice Lyons in similar circumstances to the effect 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.
- [33] In that case Mr. Palani, an employee of the Fiji Electricity Authority (another statutory body), had the benefits of a collective agreement and was entitled to natural justice before the authority disciplined him. He sought judicial review of decisions to suspend him and then to dismiss him alleging among other things a breach of natural justice.
- [34] Following various English authorities the Court of Appeal dismissed the application. It held that the fact that he was employed by a statutory authority did not inject any public law element into his service. In addition the court found the fact that his terms and conditions were implied into his contract by statute – in that case the Trade Disputes Act – did not import the necessary public law element.

- [35] The Fiji Court of Appeal placed much reliance on the leading English Authority *R v East Beshire Ex-parte Walsh* [1984] 3 ALL ER 425 in which the court held that a senior nurse could not bring judicial review against his employer, a health authority, even though his contract of employment was required by statute to incorporate a pre-existing public service agreement and did so.
- [36] The English Court of Appeal held that the question of whether a dismissal from employment by public authority was subject to public law remedies depended on whether there were special statutory restrictions, such as on dismissal, which underpin the employee's position. It did not rely on the fact of employment by a public authority or any public interest in the matter.
- [37] This so called statutory underpinning test requires that before a public law remedy can be sought in respect of statutory authority employees there must first be an underpinning of the employment by Parliament. At page 165 of the decision Sir John Donaldson M.R. stated:

*"Parliament can underpin the position of public authority employees by directly restricting the freedom of the public authority to dismiss thus giving the employee "public law" rights and at least making him a potential candidate for administrative law remedy. Alternatively, it can require the authority to contract with its employees on specified terms with a view to the employee acquiring "private law" rights under the terms of the contract of employment".*

- [38] I find there is no statutory underpinning of FIRCA employment contracts. There is no relevant statutory code governing the abolition of an office, redundancy or reinstatement. Rather consistent with the applicant's real case he is alleging that FIRCA breached the terms of his contract that were incorporated by sub-section 17(2) of the Act.
- [39] The incorporation of those terms I find does not make FIRCA a statutory body with either the powers of monarchical patronage or the requirement of feudal servitude. In other words it cannot hire or dismiss at pleasure. The only common sense view of the

establishment of FIRCA and the transfer of former government employees to work for it is that their relationship with this statutory authority after transfer was to have all the hallmarks of a contract. Sections 17 and 18 of the Act make that clear.

- [40] The fact that FIRCA is a statutory body and that the terms and conditions of the applicant's employment came from civil service conditions is not sufficient to make this a case for judicial review.
- [41] In my view it was misguided of the applicant to expect that after his transfer to FIRCA he was guaranteed continued employment with the public service until he turned 55. He had a contract of employment with FIRCA if his allegations held true then his only relief was in employment law not judicial review.
- [42] Accordingly, I refuse the application for judicial review in respect of paragraphs 1(a) and 1(c) against the first respondent.

#### **Alternate Reason for Decision**

- [43] I am persuaded that the applicant's case for relief is practically hopeless for another reason.
- [44] Even if the applicant's employment was amenable to judicial review as the statutory provisions were deemed to describe a contract involving public law amenable to judicial review that would not assist him.
- [45] In his third amended notice of motion the first decision he seeks to challenge dated the 29<sup>th</sup> of March 1999 was not in fact I find the cause of his redundancy. I go back to the factual summary at the commencement of this judgment. The applicant upon receiving the redundancy letter and the enclosed cheque first accepted the redundancy and then rejected it, returning the cheque to the first respondent. He continued in employment and took his salary.
- [46] It was not until after his unsuccessful negotiations to increase the redundancy payment and the separate issue of disciplinary proceedings had been raised that the applicant again initiated redundancy.

[47] There are a series of letters that describe the negotiations that went on after the 29<sup>th</sup> of March over the applicant's desire to seek a better entitlement. These documents are contained between pages 274 and 285 of the agreed bundle of documents.

[48] I find the applicant re-initiated his redundancy on the 9<sup>th</sup> of May 1999 some 1½ months after the letter of the 29<sup>th</sup> of March when he wrote to the Director General of FIRCA accepting the offer of the 29<sup>th</sup> of March 1999.

[49] The timeline of events is therefore:

1. Letter advising dis-establishment of position, redundancy and enclosing cheque 29<sup>th</sup> of March 1999.
2. Acceptance of that letter 29<sup>th</sup> of March 1999.
3. Rejection of that letter 29<sup>th</sup> of March 1999.
4. Negotiations to increase the amount of redundancy payment 30<sup>th</sup> March 1999 to 23<sup>rd</sup> April 1999.
5. Advise of disciplinary proceedings and suspension on full salary 23<sup>rd</sup> April 1999.
6. Withdrawal of redundancy issue by FIRCA 7<sup>th</sup> May 1999.
7. Activation of redundancy issue again by applicant 9<sup>th</sup> May 1999.

[50] I find that the applicant continued to remain in employment beyond the 29<sup>th</sup> of March 1999. Accordingly, the quashing of that decision to abolish his position and make him redundant cannot logically or legally restore his employment or give him the right to reinstatement as he was not made redundant on that date but continued in his employment.

[51] In his letter of the 9<sup>th</sup> of May 1999 he accepted redundancy. I find as a matter of fact that the decision by the first respondent on the 7<sup>th</sup> of December 2001 to reject his request for reinstatement was practically and legally correct. At that date there was nothing to reinstatement him too he having terminated his employment by accepting the redundancy.

- [52] The applicant argued during the course of these proceedings that his acceptance of redundancy was without prejudice to his rights and privileges. I reject that submission. The letter clearly accepted the redundancy offered. The money was paid and it is common ground that it was spent. It is not clear from the correspondence what the words without prejudice refer to and whether they refer to the acceptance of the redundancy or some other action that he wanted to take up once the disciplinary procedures and police investigations had been completed. The fact remains that he accepted redundancy and took the cheque. In those circumstances I am not prepared to find that he was both entitled to act in that way and persevere some public law remedy.

### **Judicial Review Against the Second Respondent**

- [53] This can be disposed off briefly. The transfer of the applicant from the Public Service Commission to FIRCA was undertaken in accordance with the act. Under the authority extended by the act the second respondent transferred the applicant to FIRCA with effect from the 1<sup>st</sup> of January 1999 (see termination letter dated 28/12/98 at page 273 of the agreed bundle of documents).
- [54] Before that transfer being undertaken the PSC had written to the first respondent regarding the transfer of IRD and Customs staff to the new established organization. The applicant took no objection to the transfer. He made no application seeking a review of the transfer decision.
- [55] Pursuant to Section 21 of the Act a person transferred to FIRCA cannot claim any benefit arising from the abolishment or re-organization of his or her office as a consequence. Section 21 reads:

*No benefits in respect of abolition or re-organization of office*

*“21. A person who is transferred to the service of the authority is not entitled to claim any benefit on the ground that he is being retired from the service of the State on account of abolition or re-organization of office in consequence of the establishment in due corporation of the authority”.*

[56] The necessary implication in that provision is that a person who is transferred to FIRCA loses any right of claim against the Public Service and the relevant PSC post is extinguished at the date of transfer making it therefore impossible to re-absorb the applicant back into the civil service once the transfer is completed. There is in short nothing to reinstate the applicant back into even if that was desirable and accordingly I also decline to grant the motion and relief requested in paragraph 1(d) of the application.

### Conclusion

[57] The third amended notice of motion for judicial review is refused. Costs should follow the event. These are to be certified by counsel and then taxed by the Master.

Hon. Justice G. Winter  
High Court of Fiji  
at Suva

.....  
Gerard Winter  
JUDGE

At Suva  
Friday, 10<sup>th</sup> November, 2006

### Solicitors

Maharaj Chandra & Associates, Suva – for Applicant  
Munro Leys Solicitors, Suva – for 1<sup>st</sup> Respondent  
Office of the Solicitor-General, Suva – for 2<sup>nd</sup> & 3<sup>rd</sup> Respondents