

**IN THE HIGH COURT OF FIJI**  
**CIVIL JURISDICTION**  
**AT LABASA**

**Judicial Review No. HBJ 03 of 2007**

**IN THE MATTER** of an Application by **RAJENDRA PRASAD** (f/n Ram Autar) of Bulileka Labasa, Accounts Officer for Judicial Review under Order 53, Rule 3(2) of the High Court Rules 1988

**AND**

**IN THE MATTER** of the Decision purported to be made by the **DIVISIONAL ENGINEER NORTHERN** and/or **MINISTRY FOR TRANSPORT, WORKS AND ENERGY** on or about 20 March 2007

**BETWEEN:**

**RAJENDRA PRASAD** f/n Ram Autar of Bulileka Labasa  
Applicant

**AND**

**DIVISIONAL ENGINEER NORTHERN** of PWD Labasa  
First Respondent

**AND**

**MINISTRY FOR TRANSPORT, WORKS AND ENERGY**  
Second Respondent

Appearances:

Counsel for Applicant: Mr Kohli  
Counsel for Respondents: Ms Lord

Date of Hearing: 11 July 2008  
Date of Judgment: 17 July 2008

**JUDGMENT**

**I. History of Termination**

In perusing the documentation before the Court in this proceeding it is difficult to conclude other than that the history founding Mr Prasad's Application is replete with convolutions, oversights and error.

1.1 This is further complicated by the Respondents' contention that no termination in fact subsists: that the termination was revoked and Mr Prasad, the Applicant, is and has since that stated revocation (said to have been advised by memorandum of 24 July 2007) been suspended, or continued on suspension rather than being terminated. However, there is more than one termination and more than one suspension, and a number of contradictory memoranda. As the chronology set out below indicates, Mr Prasad, the Applicant, has had his employment/service terminated and been suspended by successive memoranda.

1.2 He seeks judicial review in relation to the termination notified to him on 20 March 2007. Albeit or because convoluted, contradictory and complicated, the history needs to be set out so as to place the termination in context. That context is crucial to Mr Prasad's application.

1.3 I set out the memoranda and letters upon which the Applicant, Mr Prasad relies. The chronology is as follows.

1.4 On **5 December 2006** a Memorandum headed 'Irregularities in Pay Office' issued from the Divisional Engineer Northern (Works) to SCO Ram Autar (EDP 17925). The Memorandum advised that an inspection carried out by the Internal Audits of the Ministry of Finance for the week ending 24 May 2006 revealed, in short compass, that:

- Eleven (11) pay packets worth \$2,161.00 were missing;
- Thirty-eight (38) pay packets worth \$979.92 were at the week ending 24 May 2006 still with the Pay Master despite an instruction by A/AAO to receipt all pay packets;
- Fourteen (14) pay packets worth \$62.43 receipted after more than 48 hours, breaching Finance Manual 4.19;
- The Pay Office filing system was not maintained at a satisfactory level, with Petty Cash Sheets not filed in sequence according to Pay Week that also includes Bank Slip Deposits and Wages Journal;
- Registers included irregularities including –
  - Summary after each Pay Week not being carried out;
  - Copies of TMOs not attached to the Book to certify wages sent by Post;
  - Wages Pay Packets for deceased workmen are given to Ministry of Labour for distribution to beneficiaries of the deceased – Labour Department does not issue any revenue receipt for the Pay Packet received.

1.5 The Memorandum noted that the missing eleven (11) pay packets were subject to Police investigation. Explanations were requested to reach the Divisional Engineer Northern (Works) by 12 December 2006: Affidavit of the Applicant, 27 July 2007, Annexure 'A'

1.6 On **21 December 2006** Ram Autar responded by a Memorandum of that date to the Divisional Engineer Northern (Works), headed 'Irregularities in Pay Office'. Mr Autar therein provided an explanation for the missing pay packets, unclaimed wages, wages receipted after 48 hours, the filing system and registers. He added that he was 'available anytime should you need more information': Annexure 'B'

1.7 On **24 January 2007** two further missives were provided to the Divisional Engineer Northern, these relating to certain of the matters raised in the original Memorandum of 5 December 2006 (Annexure 'A'):

- Letter from Haridayal Sharma, VF 588 headed 'Re: Pay Office': Annexure 'C'
- Letter from Rajendra Prasad (the Applicant herein), HA 146 headed 'Subject: Irregularities in Pay Office': Annexure 'D'

1.8 On **26 January 2001** a Memorandum from the Divisional Engineer Northern (Works) and signed by him issued to Rajendra Prasad FNPF: HA 146, Ufs: Actg Accounts Officer. It was headed Sub: Temporary Engagement – Termination of Appointment: Annexure 'E'

1.9 It stated:

You were temporarily engaged as Labourer with effect from 28<sup>th</sup> June, 1985.

Due to unavailability of funds and the fact that all employment has been restricted to employees in the Nominal Roll, your services will be terminated from 02/02/2007 until we have funds available for your payment of wages.

Thank you for the loyal and dedicated services rendered during your period of employment with the Department. -

1.10 On **30 January 2007** a Memorandum from the Divisional Engineer Northern, signed on his behalf and headed 'Sub : Annual Leave – Unestablished' was provided to Rajendra Prasad – FNPF No. HA 146, Ufs: Actg Accounts Officer: Annexure 'F'

1.11 It said:

Your application for twelve (14) days Annual Leave with effect from 15/01/2007 to 02/02/2007 is approved.

You should resume duties on 05/02/2007.<sup>1</sup>

1.12 On **31 January 2007** a further Memorandum from the Divisional Engineer Northern was addressed to Mr Prasad. Signed by the Divisional Engineer Northern (Works), headed 'Termination', observing that on 12 January 2007 Mr Prasad had applied for Annual Leave from 15 January to 2 February 2007 for fifteen days, citing personal reasons. It said the processing of his Annual Leave Pay was undertaken with the arrangement made for payment of his Leave Pay on 12 January 2007. That, said the Memorandum, was paid to Mr Prasad by cheque no. 630605 of that date. The Memorandum went on:

However, you continued to report to work from 15.01.97 and performed the duties of Timekeeper at the Accounts Section.

Despite knowing you were on Annual Leave and having collected your Annual Leave Pay on 12.01.07, you had deliberately continued to report to work, punched your TimeCard and fed the Time to Pay Office to process your weekly wages.

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<sup>1</sup> The words and numbers 'twelve (14) days Annual Leave' are as appear in the Memorandum.

As the Timekeeper, you had also failed to get your Time Card endorsed by your Head of Section, Acting Accounts Officer - A. Kinikini, in order to continue drawing your weekly wages.

You also submitted sick sheets for 17.01.07 – 19.01.07 for which you were paid and later on 30.01.07 to 31.01.07 with the intention of getting paid for Sick Leave: Annexure 'G'

1.13 The Memorandum concluded with the advice that Mr Prasad was 'hereby suspended without wages with immediate effect pending investigation' and that he should 'hand over all official keys and documents to A. Kinikini immediately'. This was based upon the Divisional Engineer Northern (Works)'s 'having sighted all the documents' and being of the opinion that Mr Prasad:

... had deliberately continued to report to work, punched [his] Time Card, failed to have [his] Time card endorsed by [his] Section Head. had also deliberately fed those unauthorized hours to Pay Office and ... continued to draw [his] weekly wages for the period [he] had already been paid for – (15.01.07 – 02.02.07), thereby, falsifying official records and documents in order to get double pay and misleading management, through the non-submission of the Annual Leave Time Card to Pay Office (to advise them that [he was] supposed to be on Annual Leave during the period in question).

1.14 On **2 February 2007** a further Memorandum was provided to Mr Prasad, almost identical in all its terms<sup>2</sup> to that dated 31 January 2007, except that the February Memorandum was headed 'Sub : Suspension' instead of 'Sub : Termination'. It, too, was signed by the Divisional Engineer Northern (Works).

1.15 On **12 February 2007** came another Memorandum signed by the Divisional Engineer Northern (Works) and addressed to Mr Prasad, this headed:

Sub : TEMPORARY ENGAGEMENT  
TERMINATION OF ENGAGEMENT

1.16 It stated:

Please refer to my earlier memorandum dated 26<sup>th</sup> January, 2006 with regards to the above.

Please disregard the earlier memorandum entitled the above as you are currently under suspension pending investigations for alleged discrepancies discovered in your Section: Annexure 'I'

1.17 On **12 February 2007** (that same day), the Acting Accounts Officer, A. Kinikini, addressed a Memorandum to Mr Prasad as 'Time Keeper',<sup>3</sup> the subject heading stating: 'Re : Explanation'.

1.18 The Memorandum sought Mr Prasad's 'explanation on the following issue':

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<sup>2</sup> See further later.

<sup>3</sup> There was some disagreement as to Mr Prasad's job designation or job title. Subsequently the Respondents acknowledged Mr Prasad was 'Pay Clerk' with the Pay Office rather than 'Labourer' (or Pay Master as stated by Mr Prasad): Affidavit in Reply, filed 28 May 2008, paras 5-7.

- (i) Day-Off Register for 2006 which suppose to be under your custody.
- (ii) Your original Time Card in which you are paid from Week Ending 15/01/07 – 24/01/07
- (iii) Why are most of the punching cards for December 2006 not authorized before feeding those hours into the system? [None of the Time Cards have my endorsement, explain why?]

1.19 It concluded:

I need an explanation with 7 days from the date of this memorandum: Annexure 'J'

1.20 By Memorandum dated **26 February 2007**, Mr Prasad responded:

Sir, a lot of letters have been written regarding this issues but nothing has been done and myself being victimized.

i) **Day off Register : 2006**

After opening a day off register for 2007 and entering all the day offs for all the people I had put the day off register on the shelf behind where I sit. It was there until I came on leave. Who used the day off register after I left, I had no idea.

ii) **Time Card**

There was only one time card made for my leave from 15/01/07 to 24/01/07. it was made by Mrs Oppal at her home and given to me. It was duly signed by her and I brought it to Mr. Kinikini who signed and recommended for petty cash payment which was done through a payment voucher.

iii) **Authorization of Time Card**

Since I became the time keeper no time cards were signed by you except when petty cash payment were required. Since you never asked for the time cards, I thought it was all right.

Sir, I hope the explanation given by me will meet your requirements.

1.21 There appears to have been no acknowledgement of or response to Mr Prasad's letter of explanation of 26 February 2007 replying to Mr Kinikini's request, for the next Memorandum in the series, dated **5 March 2007** and from the Divisional Engineer Northern (Works) and signed by him, is headed 'Sub : **EXPLANATION**' and states that it has been 'brought to my attention that you had breached the following procedures': Annexure 'L'

1.22 The Memorandum goes on to list 4 items, in short compass these being:

- Application for Annual Leave effective from 15 January 2007 for which Mr Prasad was 'paid vide Petty Cash on 12<sup>th</sup> January, 2007'; nonetheless she continued to report to work from 15 January 2007, punching his Time Card, etc. An explanation is requested as to why he continued to report to work when he 'knew [he was] on Annual Leave'.

- Failure to 'get Time Cards for Government Wage Earners endorsed' by his Section Heads before feeding time into the Time Sheets for payment of wages by the Pay Office, and the consequences.
- Initialing 'Authority – Overtime' forms for the Account Section Government Wage Earners claims for overtime hours and entering those hours in the Overtime Register, with a closer check revealing 'that the Authority – Overtime forms do not have the endorsement from the Divisional Engineer Northern (Works), with a request to 'explain who authorized you to make those entries in the Overtime Register without the approval from the Divisional Engineer?'
- An allegation that the Overtime Register for 2006 which had been in Mr Prasad's custody 'has gone missing' and a 'Please explain' as to 'how documents belonging to the Government under your custody, has gone missing?'

1.23 The Memorandum concludes that Mr Prasad's explanation 'should reach this office no later than seven (7) days from the date of this memorandum'.

1.24 On **20 March 2007** a further Memorandum issued to Mr Prasad from the Divisional Engineer Northern (Works) signed by him and headed 'Sub : TERMINATION OF SERVICE': Annexure 'M'

1.25 This Memorandum observed that 'no clarification' had been forthcoming from Mr Prasad's 'end to date' in response to the Divisional Engineer Northern (Works)'s memorandum of 5 March 2007 entitled 'Explanation'. It goes on:

Under the conditions and Rules of Employment for the Government Wage Earners Section V56(c) "where an employee fails to state in writing under sub-paragraph (b) above whether he/she admits or denies the charge, he/she shall be deemed to have admitted the charge." (Emphasis in original)

1.26 It concludes:

Your services will, therefore, be terminated with immediate effect.

1.27 That in turn concludes the recitation of the history as outlined, through Annexures, in the Affidavit of Mr Prasad in support of his application. There is one further document, however, upon which the Respondent relies and which is said by the Respondent to continue (and in turn to conclude) the history or chronology. This document is attached to the Affidavit in Reply, filed with the High Court on 28 May 2008. Mr Prasad, says he at no time received this Memorandum and contests its existence on the date it bears.

1.28 The Memorandum is said to be from the Divisional Engineer Northern (Works) and is signed by him. It is dated **24 July 2007** and is headed: 'Sub : Revocation of Termination'. It says:

Please refer to my Memorandum dated 20<sup>th</sup> March, 2007 entitled "Termination of Service" due to your failure to answer to allegations. You are requested to disregard the above Memorandum as your termination has been revoked.

Your suspension without wages however, still stands pending the Disciplinary procedures.

You will be advised on further proceedings in due course.

**2. Basis of Application and Relief Sought**

The Statement filed under Order 53 Rule 3(2) of the High Court Rules 1988 states amongst other matters that the decision of the Divisional Surveyor [Engineer] Northern to terminate Mr Prasad's services 'is erroneous in that he':

- i) acted unreasonably;
- ii) has taken into account irrelevant considerations;
- iii) has not taken into account relevant considerations;
- iv) acted in breach of the rules of natural justice;
- v) acted unfairly;
- vi) acted in breach of the Applicant's legitimate expectations.

2.1 The grounds upon which relief are sought against the Divisional Engineer Northern and/or Ministry for Transport, Works and Energy are stated as:

- (a) That the **DIVISIONAL ENGINEER NORTHERN** and/or **MINISTRY FOR TRANSPORT, WORKS AND ENERGY** abused their discretion in that they did not take into consideration the following relevant matters: -
  - (i) The Applicant was not given a fair hearing.
  - (ii) The Applicant was not given an opportunity to be heard prior to termination of his employment.
  - (iii) The explanations given by Ram Auta and Haridayal Sharma.
  - (iv) That the Applicant could not have given an explanation when he was suspended as he did not have access to the records.
  - (v) That the **DIVISIONAL ENGINEER NORTHERN** and/or **MINISTRY FOR TRANSPORT, WORKS AND ENERGY** abused their discretion in that they took into consideration the following relevant matters: -
    - (vi) Section 56(c) of the Conditions and Rules of Employment for Government Unestablished Employees.
    - (vii) That the **DIVISIONAL ENGINEER NORTHERN** and/or **MINISTRY FOR TRANSPORT, WORKS AND ENERGY** have acted arbitrarily and/or unreasonably;
    - (viii) That the **DIVISIONAL ENGINEER NORTHERN** and/or **MINISTRY FOR TRANSPORT, WORKS AND ENERGY** have acted contrary to the legitimate expectations of the Applicant.

2.2 The relief sought in the Statement and the Application for Leave is:

- (b) AN ORDER OF CERTIORARI to remove the said decision purported to be made by the DIVISIONAL ENGINEER NORTHERN and/or MINISTRY FOR TRANSPORT, WORKS AND ENERGY on or about the 20<sup>th</sup> of March, 2007 into this Honorable Court and that the same be quashed.
- (c) A DECLARATION (in any event) that the DIVISIONAL ENGINEER NORTHERN and/or MINISTRY FOR TRANSPORT, WORKS AND ENERGY have acted unfairly and/or abused their discretion and/or arbitrarily and unreasonably and/or acted in breach of the Applicant's Legitimate Expectations and/or exceeded their jurisdiction in purporting to decide to terminate Rajendra Prasad (f/n Ram Autar).
- (d) Damages.
- (e) Further Declarations or other relief as to this Honourable Court may deem fit.
- (f) Costs on indemnity basis.

### 3. Notice of Opposition

The Notice of Opposition to the leave application was filed on 20 September 2007.<sup>4</sup> It says that the Respondents oppose the application for leave in that 'it is not an arguable case upon the following grounds', stated as:

#### 1. Procedural Impropriety

That the Applicant is seeking to review the decision of the Divisional Engineer Northern (hereinafter called 'DEN') to take disciplinary action against him or decision to terminate him thereafter. The Appellant's Affidavit in support of the application filed to identify any procedural impropriety to the process leading to the decision. The Applicant is employed as Temporary Labour officer in the classification of Wage Earner in the Public Service employment cadre and not as claimed as Accounts Officer as claimed. All officers employed under that classification are bounded by the employment rules and conditions commonly known as the 'JIC' which is a joint agreement between the PSC and the Public Employees Union. They are also subject to the Code of Conduct spelt out under the Public Service Act 1999. The disciplinary procedure is clearly spelt out in the JIC and the DEN is bounded by the HIC to reach a decision and award any penalty under section 59 of the same. As to this case there is no decision been taken until today as the disciplinary process is still in the process. The Board did not breach the Act stated herein to amount to any procedural impropriety that warrants a review of the decision of the Board.

#### 2. The Disciplinary Procedure has yet to be completed

That the disciplinary process has not been completed. This is due to the fact that the Applicant failed to respond to the written allegations submitted to him that demanded his reply by DEN. Thereafter the DEN will decide whether to lay disciplinary charges against the Applicant or uplift the suspension. If he decides to lay disciplinary charges then the matter shall proceed to a disciplinary hearing. If DEN decides not to lay charges and uplift the suspension, the applicant will be notified accordingly.

<sup>4</sup> This date is relevant to the Applicant's contentions as to the (non)existence as at 24 July 2007 of the memorandum headed 'Revocation of Termination'. See later.



3. **The Judicial Review is Prejudicial to the Administrative Flow of Decision**

That the Application for leave to apply for Judicial Review is prejudicial, unreasonable and further may disrupt and cause further delay to the administration decisions in regards to the disciplinary processes that is still pending.

4. **Leave Granted**

On 24 September 2007 leave for judicial review was granted by His Lordship Justice Winter. The file indicates:

- (1) There is a serious issue to be reviewed:  
The employee is saying 'you made a decision to terminate my employment w/o charges or a hearing';  
The employer is saying 'you didn't reply so I am entitled to'.
- (2) The [judicial review] is of the employer's reasonableness in making that decision.
- (3) By consent leave to bring [judicial review] granted.  
By consent grant of leave to operate as a stay.
- (4) Orders -
  - (i) Leave granted in terms
  - (ii) Interim injunction granted in terms until 26/11/2007
  - (iii) Deponent to reply by the 30 October 2007
  - (iv) Next mention before Master on the 3<sup>rd</sup>/11/07 10.00am<sup>5</sup>

5. **Further Documentation Before Court**

Following various mention dates, on 28 May 2008 the Respondents filed an Affidavit in Reply. Originally, there was some contention as to Mr Prasad's position or designation within the Ministry of Transport, Works and Energy. The Respondents by the Affidavit agreed that Mr Prasad commenced work with the Public Works Department as a labourer in 1985. Then, in consequence of various promotions, regradings and/or transfers he became Chief Clerk A from 14 July 2005. Mr Prasad described himself as 'Pay Master' which the Respondents state is not correct: rather, that he was a Pay Clerk within the Pay Office.

5.1 There is both agreement and disagreement, together with some confusion in the history and dates of various documents and their status or character.

5.2 The Respondents agree that in response to the 5 December 2006 Memorandum from the DEN to Ram Autar, the following were received:

- Ram Autar's reply dated 21 December 2006: para 1.5 above
- Haridayal Sharma's letter dated 24 January 2004 in relation to the matters raised in the DEN's Memorandum: para 1.6 above

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<sup>5</sup> The Applicant had sought a stay and interlocutory injunction – see Ex-Parte Notice of Motion for Stay and an Interlocutory Injunction, filed 3 September 2007.

- Rajendra Prasad's letter dated 24 January 2004 in relation to the matters raised in the DEN's Memorandum: para 1.6 above: Affidavit in Support, paras 12-14, Annexures 'B', 'C' and 'D'

5.3 Paragraph 12 of the Respondents' Affidavit in Reply responds to paragraph 23 of the Applicant's Affidavit. The respective paragraphs are as follows:

23. **AS** I was suspended and not at work I could not give full explanation to the matters raised by [the DEN] as all the documents were at work. In any event I had given an explanation earlier in writing and verbally: Applicant's Affidavit, filed 27 July 2007<sup>6</sup>

12. **THAT** in reply to paragraph 23, the Applicant did submit an explanation dated 6<sup>th</sup> March 2007 for clarification on matters raised by the Acting Accounts Officer Mr A. Kinikini (dated 21/02/2007 and 26/02/2007), in relation to allegations that the Applicant continued to punch his time card and claim wages when he was on [leave]. However the Applicant did not respond to the Divisional Engineer Northern Works Memo dated 5<sup>th</sup> March, 2007.

5.4 As the chronology set out in paragraph 1ff above indicates, there was no explanation dated 6<sup>th</sup> March 2007 from Mr Prasad. Mr Prasad responded to Mr Kinikini by memorandum of **26 February 2007**: para 1.19 above

5.5 There is also dispute between the parties as indicated in paragraph 14 of the Respondents' Affidavit in Reply, and paragraph 8 of the Applicant's Affidavit in Response, filed 3 June 2008:

13. **THAT** the Respondents admits paragraph 24 and further states that a Memorandum was written to the Applicant on 24<sup>th</sup> July 2007, informing the Applicant that his termination referred to in the Memorandum of 29<sup>th</sup> March 2007 was revoked and that the Applicant's wages was however still suspended pending the Disciplinary Proceedings, which is still in process. Annexed and marked as 'IVK1' is a copy of the Memorandum dated 24 July 2007.<sup>7</sup>

8. As to the contents of paragraph 13 I categorically deny receiving memorandum of 24<sup>th</sup> July, 2007.

5.6 The Court also had the benefit of Counsels' written submissions:

- Submissions on behalf of the Applicant, filed 2 June 2008
- Submissions on behalf of the Respondents, filed 9 July 2008

## **6. Contentions of the Parties**

The contentions of the parties are set out in their respective submissions.

6.1 (a) **The Applicant:** For the Applicant, Mr Prasad, it is said:

A. The Divisional Engineer Northern (DEN)'s memorandum of 5 March 2007 had been responded to effectively by Mr Prasad's letter of 26 February 2007 to Mr Kinikini and,

<sup>6</sup> See also paragraph 7, Affidavit in Response to the Affidavit in Reply, filed 3 June 2008.

<sup>7</sup> The contents of this Memorandum are set out in paragraph 1.28 above.

further, that Mr Prasad should have been given an opportunity to be heard before termination.

B. The Respondents abused their discretion by not taking into consideration:

- termination under section 56(c) was illegal because no charges were ever laid against Mr Prasad;
- section 56(c.) applies only where charges are laid against an employee and the employee fails to state in writing an admission or denial of the charges;
- Mr Prasad was given no opportunity to be heard as to penalty to be imposed prior to termination;
- explanations by Ram Autar (21 December 2006), Hardayal Sharma (24 January 2007) and Mr Prasad (26 February 2007);
- Mr Prasad's period of employment and clean record for 22 years of employment;
- the alleged breaches (denied) were not serious in nature.

C. The Respondents abused their discretion by taking into consideration section 56(c) of the Conditions and Rules of Employment for Government Unestablished Employees, an irrelevant matter.

D. The Respondents acted arbitrarily and/or unreasonably.

The Department had a personal agenda against Mr Prasad, per the letter of 26 January 2007 purporting to terminate his services for lack of funds, then proceeding to grant him annual leave per 30 January 2007 and asking him to resume duties on 5 February 2007.

E. The Respondents exceeded jurisdiction in that the DEN had no power to terminate Mr Prasad as powers of termination can be involved only after charges have been laid.

F. The Respondents acted contrary to Mr Prasad's legitimate expectations in that Mr Prasad was employed by the Public Works Department from 1985 and had all reasons to expect he would continue to be so employed as he had no adverse reports against him and people doing the Department after Mr Prasad were all retained by the Department.

6.2 (b) **Submissions for the Respondents:** The Respondents, the Divisional Engineer Northern and Ministry for Transport, Works and Energy, rely upon the letter of 24 July 2007 informing Mr Prasad of his suspension pending disciplinary proceedings, submitting that as:

- Mr Prasad has been suspended; and
- the Department will be initiating disciplinary proceedings,

the decision Mr Prasad seeks to have reviewed no longer exists.

6.3 Hence, the Respondents submit that the application for judicial review should be dismissed with costs because:

- the decision sought to be reviewed no longer exists; and
- there are no exceptional circumstances justifying the consideration of what is now an academic question, namely the circumstances surrounding the termination.

6.4 As to 'exceptional circumstances' and 'an academic question', the Respondents rely upon *Public Service Commission v. Solomon Sila Kotobalavu* [2004] FJCA 51; abu0031.2004S where the Court referred to 'exceptional circumstances which would justify the consideration of academic questions', citing *Reg v. Secretary of State for the Home Department; Ex parte Salem* (1999) 1 AC 450:

... in a cause where there is an issue involving a public authority as to a question of public law, your Lordships have a discretion to hear the appeal, even if by the time the appeal reaches the House there is no longer a *lis* to be decided which will directly affect the rights and obligations of the parties *inter se*. The decisions in the *Sun Life case* and *Ainsbury v. Millington* (and the reference to the latter in the rule 42 of the Practice Directions applicable to Civil Appeals (January 1996) of your Lordship's House) must be read accordingly as limited to disputes concerning private law rights between the parties to the case.

The discretion to hear disputes, even in the area of public law, must however be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not only involve detailed consideration of facts and where a large number of similar cases exists or are anticipated so that the issue will most likely need to be resolved in the near future: at 456-57 per Lord Slynn

6.5 (c) *Further from Applicant:* The Applicant denies receiving the letter or memorandum of 24 July 2007 and contests its existence as at that date. The Applicant observes the absence of any reference to the 24 July 2007 missive in the Notice of Opposition dated 21 September 2007 and filed on 20 September 2007 – that is some two months after the 24 July date.

6.6 There is also no reference in the Notice of Opposition to the contention now relied upon that the termination was revoked and suspension substituted, or remained in place.

6.7 The Applicant says that the first indication of the 24 July 2007 missive was in the Affidavit in Reply filed on behalf of the Respondents on 28 May 2008. The memorandum or letter is referred to in paragraph 13 of the Affidavit and annexed as 'IVK1'.

6.8 In oral submissions, Counsel for the Applicant says that the letter or memorandum of 24 July 2007 'cannot be relied upon because it did not exist'. He says that the onus lies upon the Respondents to prove that the letter or memorandum of 24 July 2007 did exist.

6.9 In response to my question whether, if the termination was revoked and Mr Prasad was suspended, it follows that the judicial review application should be dismissed. Counsel for Mr Prasad said 'no', on the basis that the judicial review application relates to the termination and what subsisted as at the date of the termination. Asked what of the proposition that, if Mr Prasad is suspended, the matter should be dealt with in or through the Public Service process, not in the Court through judicial review, Counsel for Mr Prasad referred to and outlined the history of the matter by reference to the memorandum of 26 January 2007 advising Mr Prasad of termination due to lack of funds; the memorandum of 30 January 2007 approving Mr Prasad's annual leave and indicating he should resume duties on 5 February 2007; the memorandum of 31 January 2007 advising that Mr Prasad was suspended pending investigation (and which makes no reference to Mr Prasad's termination per the 26 January 2007 memorandum); the memorandum

of 12 February 2007 asking that Mr Prasad disregard the memorandum of 26 January 2007; the memorandum of 20 March 2007 advising that Mr Prasad's employment was 'now terminated'. Counsel for Mr Prasad said that this readily indicated – unfairness; proper procedures were not followed; and victimization – as to the latter, he said that the history 'speaks for itself'.

6.10 As to paragraph 5 of the Respondents' submission, namely that Mr Prasad's termination is now an academic question, Counsel for Mr Prasad asked why the letter or memorandum purporting to end the termination and reinstitute the suspension was not referred to in the Respondents' material earlier: why not file it in 2007? As Mr Prasad denies receiving that memorandum, why are the Respondents not calling evidence to show that it was served upon Mr Prasad, asked Mr Prasad's Counsel, noting Mr Prasad's presence in Court to give evidence on oath that he was not served.

6.11 (d) **Further from the Respondents:** In oral submissions, for the Respondents it was said that Mr Prasad is an employee of the PSC and is governed by the Code of Conduct and the Public Service Act. As he is suspended, not terminated, then this must be governed by the Public Service Process.

6.12 Counsel drew attention to the memorandum of 24 July 2007 referring to the suspension of 2 February 2007 and advised that no charges are yet laid, however she is informed that charges will be laid soon.

6.13 Counsel for the Respondents referred to the *Public Service Commission v. Kotobalavu* [2004] FJCA 51, saying that there is no practical value in the judicial review application and the application should be dismissed.

6.14 Asked whether the disputed contention that Mr Prasad is suspended rather than dismissed could come within the dictum of Lord Slynn in *Reg v. Secretary of State for the Home Department; ex parte Salem* (1999) 1 AC 450, at 456-57 as constituting 'a good reason in the public interest' for hearing the judicial review application or an 'exceptional circumstance', Counsel for the Respondents agreed that it may.

## 7. Grounds of Application for Judicial Review

Before considering the question of suspension versus termination, I consider each of the grounds in the application. I have done this because it appears to me that the process adopted in relation to the Applicant, Mr Prasad, contains serious flaws the Respondents need to address. The Applicant's contention is that he has been 'victimised'. This suggests that the process adopted was exclusive to him or that, at least, is his perception. At the same time, the flaws may indicate a generalised tendency towards a lack of process or flawed process affecting the operations of the Respondents. It is therefore important that the Respondents be alerted to them so that these procedural errors should not be repeated in the future.

7.1 (a) **Applicant not given a fair hearing:** In *Pal v. Public Service Commission* [2000] FJCA 33; ABU0072U.98S (1 December 2000) the Court of Appeal observed that in respect of the right to be heard or a fair opportunity to be heard:

The authorities in this Court and the Supreme Court ... are clear. The judgments in the cases of *The Permanent Secretary for the Public Service Commission and Another v. Lagiloa* (Civil Appeal 38 of 1996) and *The Permanent Secretary for the Public Service Commission and Another v. Matea* (Civil Appeal 16 of 1998), have stated that, where

the person's livelihood is at stake, it is a breach of natural justice if he is not given the right to be heard: at 4

7.2 In *Pal v. Public Service Commission* the Court of Appeal observed that in *Matea's case* the principle was summarised thus by the Court of Appeal:

The requirement that a person be given a fair opportunity to be heard before a body determines a matter that affects him adversely is so fundamental to a civilised legal system that it is to be presumed that the legislative body intended that a failure to observe it would render the decision null and void. If there are no words in the instrument setting up the deciding body requiring that such a person be heard the common law will supply the omission. It will imply the right to be given a fair opportunity to be heard. While the legislative body may exclude, limit or displace the rule it must be done clearly and expressly by words of plain intentment. The intention must be made unambiguously clear. Finally we add that what is a 'fair hearing' will depend on the circumstances of each case; it does not mean that in every case right of personal appearance must be given: cited at 4

7.3 Further in *Pal v. Public Service Commission* the Court of Appeal quoted from the Supreme Court judgment on appeal by the Public Service Commission, wherein that Court held:

... the appeal on such a question is virtually hopeless. There are numerous authorities establishing, at common law, that where someone's livelihood is at stake the person is entitled to a fair opportunity of a hearing unless the relevant legislation has clearly excluded it: cited at 4

7.4 *Pal v. Public Service Commission* related to a decision made by a tribunal in respect of a hearing after Mr Pal had been dismissed following a Public Service Commission process. However, the principle set out there and in *Matea's case* is applicable in the circumstances of Mr Prasad's employment with a government department or entity, the Ministry for Transport, Works and Energy ('the Ministry').

7.5 To explore whether the grounds advanced for the Applicant are sustainable, it is important to put the termination of 20 March 2007 in context. The history predating the 20 March 2007 termination provides a backdrop to the Applicant's contention that the termination notified by the 20 March 2007 memorandum was effected in breach of procedural fairness.

7.6 Prior to his termination notice by Memorandum of 20 March 2007, the decision which is the subject of this application, the record indicates that Mr Prasad did on at least two occasions avail himself of an opportunity to provide an explanation as to some of the matters raised in various Memoranda from the Divisional Engineer Northern or another superior. Mr Prasad says in his Affidavit in Support that he also made an oral representation.

7.7 Two possibilities follow in respect of these explanations which predate the 20 March 2007 termination Memorandum:

- The record may be taken as showing nothing to affirm that Mr Prasad's written explanations were taken into account or even read, or that his oral explanation was taken into account – that is, there is no response to them before the Court and no evidence to indicate that they were responded to whether orally or in writing;

- On the other hand, some items on the record appear to indicate that his explanations (and Mr Autar and Mr Sharma's) may have been accepted, because Mr Prasad's application for leave was granted – which appears to confirm there was no concern on the part of his employer as to the matters raised to which Mr Autar, Mr Sharma and he provided written advices/explanations;

7.8 However, the record then contradicts this possibility, as it appears to show that rather than the approval of leave being affirmation of Mr Prasad's continued employment, there is simply a lack of consistency or confusion on the part of his employer – which is borne out by other discrepancies in the material before the Court which was generated by the Respondents or on their behalf.

7.9 According to the history before the Court, the first query as to 'Irregularities in Pay Office' was made on 5 December 2008 to Mr Ram Autar, not to Mr Prasad. Mr Ram Autar responded (21 December 2006) and a month later both Mr Haridayal Sharma and Mr Prasad provided explanations by individual letters to the Divisional Engineer Northern (DEN): 26 January 2007

7.10 There appears to have been no response by the DEN or the Ministry to Mr Autar's explanation, nor to the additional advices provided by Mr Sharma and Mr Prasad. There is no indication that those explanations were taken into account by the DEN or the Ministry, or whether the explanations were accepted or discounted.

7.11 Two days after Mr Prasad's letter to the DEN on the subject of the 'Irregularities in Pay Office', he received the Memorandum advising his that his employment was terminated 'due to unavailability of funds' and 'all employment [being] restricted to employees in the Nominal Roll': 26 January 2007

7.12 Four days later came the Memorandum to Mr Prasad approving his application for 'twelve (14) days Annual Leave': 30 January 2007

7.13 The following day, Mr Prasad was both 'suspended' and 'terminated' in respect of his employment, by way of the Memorandum of 31 January 2007 which was headed 'Sub : Termination' but ended with a paragraph stating:

In view of the above, you are hereby suspended without wages with immediate effect pending investigation. You are to hand over all official keys and documents to A. Kinikini immediately.

7.14 Albeit some matters had been raised with Mr Autar, Mr Prasad was given no prior warning of all the matters set out in the Memorandum nor of his termination or suspension by reason of those matters. He was thereby given no opportunity to provide any explanation in relation to them.

7.15 Two days later the Memorandum of 2 February 2007 was couched in almost the same terms as the Memorandum of 30 January 2007, with a different heading, namely 'Sub : Suspension' and the penultimate paragraph changed in some of its wording:

Having sighted all the documents, I am of the opinion that you had deliberately continued to report to work, punched your Time Card, failed to have your Time card endorsed by your Section Head. You had also deliberately fed those unauthorized hours to Pay Office

and have continued to draw your weekly wages for the period that you had already been paid for- (15.01.07 – 02.02.07), thereby, falsifying official records and documents ***in order to get double pay and misleading management***, through the non-submission of the Annual Leave Time Card to Pay Office (to advise them that you were supposed to be on Annual Leave during the period in question): Memorandum of 31 January 07

Having sighted all the documents, I am of the opinion that you had deliberately continued to report to work, punched your Time Card, failed to have your Time card endorsed by your Section Head. You had also deliberately fed those unauthorized hours to Pay Office and have continued to draw your weekly wages for the period that you had already been paid for- (15.01.07 – 02.02.07), thereby, falsifying official records and documents, ***purportedly to defraud the State*** through the non-submission of the Annual Leave Time Card to Pay Office (to advise them that you were supposed to be on Annual Leave during the period in question) and the continuous feeding of Time for the payment of your weekly wages: Memorandum of 2 February 2007

7.16 Next – ten days after the ‘suspension’ Memorandum – came the Memorandum of 12 February 2007 advising Mr Prasad that his termination on the basis of ‘lack of funds’ and ‘temporary engagement’ was to be disregarded as Mr Prasad was ‘currently under suspension pending investigations for alleged discrepancies discovered in [his] Section’. At that date – 12 February 2007 – Mr Prasad’s employment would already have been terminated according to the 26 January 2007 Memorandum, which said his termination would date from 2 February 2007.

7.17 Fourteen days later, on 26 February 2007, came the Memorandum from the Acting Accounts Officer, A. Kinikini, seeking Mr Prasad’s explanation on issues relating to the Day-Off Register for 2006, his original Time Card for 15/01/07 – 24/01/07, and why punching cards for December 2006 did not have his (A Kinikini’s) endorsement and were not authorized before feeding into the system. That same day, Mr Prasad provided his memorandum titled ‘Explanation Letter’ addressing those three issues. There was no response to Mr Prasad’s ‘Explanation Letter’ and no indication that it had been taken into account or read, or drawn to the attention of the DEN.

7.18 Seven days after A. Kinikini’s memorandum to Mr Prasad, and seven days after his ‘Explanation Letter’, by Memorandum of 5 March 2007 the DEN asked for Mr Prasad’s explanation as to alleged breaches of procedures involving his Annual Leave and reporting to work; a failure to get Time Cards for Government Wage Earners endorsed by Section Heads and other aspects of that matter; lack of endorsement from the DEN on Authority – Overtime Forms; and the missing Overtime Register for 2006. This Memorandum asked for an explanation from Mr Prasad within seven days (12 March 2007).

7.19 Then came the ‘Termination of Service’ Memorandum of 20 March 2007.

7.20 In light of all the foregoing, it is difficult to sustain a contention that Mr Prasad was given a fair hearing. True it is that he did not provide an explanation directly to the DEN in response to the memorandum of 20 March 2007. However, as noted he had provided explanations on a number of occasions to matters raised by the various memoranda, including that to Mr Autar. As also noted, there is no indication that these explanations had been taken into account by the DEN or the Ministry. A fair hearing provides a person not only with an opportunity to provide an explanation or to respond, but an assurance that any explanation or response has been received, read, listened to, taken into account. A fair hearing also requires that the person has clarity as to what it is that s/he is being asked to respond to or explain. The multiple memoranda issuing to Mr



Prasad have some consistencies in the issues they raise, however, some of them are contradictory and indeed there is a likelihood that Mr Prasad, when confronted by them, was consigned to a state of bewilderment. This would be unsurprising. Mr Prasad does assert his view that he is or was being victimized. This perception in turn may be considered to be unremarkable.

**7.21 All of this supports the proposition that Mr Prasad was not given a fair hearing. In my opinion, the facts speak for themselves: Mr Prasad was not given a fair hearing. This ground is upheld.**

7.22 (b) *Applicant not given opportunity to be heard prior to termination:* Mr Prasad may be said to have been given an opportunity to be heard in respect of the matters which led to his termination, in that the Memorandum of 5 March 2007 from the DEN concluded with the words:

Your explanation should reach this office no later than seven (7) days from the date of this memorandum.

7.23 Opposing this is that the Memorandum of 26 February 2007 from the Acting Accounts Officer A. Kinikini seeks an explanation 'within 7 days from the date of this memorandum' in relation to what appear to be the same issues (albeit it refers to the 'Day Off Register' whilst the DEN's Memorandum refers to the 'Overtime Register'), and Mr Prasad provided his response to that Memorandum, as noted, on the same day (26 February 2007).

7.24 That Mr Prasad's response to the Acting Accounts Officer, provided in a timely manner, appears to have been ignored in that:

- it is not acknowledged nor responded to by the Acting Accounts Officer; and
- the DEN's Memorandum issues seven days later, itself seeking a response within seven days and making no reference to the Acting Accounts Officer's Memorandum and Mr Prasad's response,

gives rise to a reasonable assumption or at least a reasonable apprehension on the part of the recipient of both Memoranda that an explanation provided by him will or may well not be taken into account, or even read or acknowledged.

7.25 Alternatively, if one were to accept that Mr Prasad's explanation to the Acting Accounts Officer's Memorandum was read and passed on to the DEN, the issuing of the DEN's Memorandum could show that Mr Prasad's explanation to the DEN would be ignored, make no difference or have no impact, because all that resulted from that explanation when given to Mr Kinikini was a Memorandum in like terms from the DEN. Why, then, send the same explanation to the DEN in response to the DEN's Memorandum?

7.26 In my opinion, the right to be heard or provision of an opportunity to be heard must be one which conveys to a party a confidence in the process – that is, a confidence that the right is real and the opportunity is a real opportunity. The right or opportunity is not provided where it is a matter of rote or an 'opportunity' without an assurance that the party's use of the opportunity (by the provision this case of an explanation) will be worthwhile.

7.27 In coming to my conclusion on this ground, I have taken into account the history as portrayed through the material before the Court. I focused particularly upon the apparent failure of the Respondents to take into account or be in any way mindful of Mr Prasad's explanation provided to the Acting Accounts Officer in relation to the matters raised, on the same day as he

received that memorandum. It is not suggested that the Acting Accounts Officer had to accept Mr Prasad's explanation nor that, if passed on to the DEN the DEN had to accept it. However, the Applicant was entitled to know whether or not attention was being directed to the explanation he gave, whether that explanation was being taken into account, and whether issue was taken with it.

7.28 In accordance with all the foregoing, in my opinion the statement:

Your explanation should reach this office no later than seven (7) days from the date of this memorandum.

did not provide Mr Prasad with a right to be heard in the full or effective meaning of that right and did not provide an opportunity to be heard in the full or effective meaning of 'the opportunity to be heard'.

**7.29 Mr Prasad was not granted a right to be heard or the opportunity to be heard before the decision to terminate his employment was made by the Respondents or either one of them. This ground is upheld.**

7.30 (c) *Applicant not given opportunity to be heard on penalty:* Mr Prasad was given no opportunity to be heard on penalty: the Memorandum which led to his termination asked for his explanation 'within seven days'. As noted, he had already provided an explanation to Mr Kinikini. Upon receiving no further explanation, the DEN advised Mr Prasad by Memorandum that his employment/service was terminated.

7.31 In *Pal v. Public Service Commissioner* [2000] JCA 33; ABU0072U.98S (1 December 2000) the Court of Appeal addressed the right to be heard generally and 'to address the Commission on penalty ...' The Court held that the authorities in both the Court of Appeal and the Supreme Court were clear:

... where the person's livelihood is at stake, it is a breach of natural justice if he is not given the right to be heard: at 4

7.32 In *Pal v. Public Service Commissioner* the contention for the Commissioner was that Mr Pal had been able to put his case to the tribunal and that his lawyer 'clearly anticipated the possible need to mitigate the penalty at that stage and, at the conclusion of his written submission, referred to sentence. It is suggested that this provided a reasonable opportunity to be heard': at 5

7.33 In the present application, unlike Mr Pal, Mr Prasad was not availed of a reasonable opportunity to be heard even in the terms Mr Pal had. Even then, the Court of Appeal went on to say that Mr Pal had not been extended natural justice or procedural fairness in respect of the question of penalty.

7.34 In *Pal v. Public Service Commissioner* a number of charges were leveled against Mr Pal. Where there are a number of charges, said the Court, 'what may be the appropriate penalty will relate to the number and nature of the offences made out'. The mitigation put forward by Mr Pal's lawyer was 'clearly based on the contention that some at least of the offences had not been made out'. The Court went on to say:

The matters that would be relevant in mitigation following a finding of guilt on, say, two relatively technical offences are likely to be very different from those that would be needed following findings of guilt on all charges. In the latter case, it is clear that result is

likely to have a considerable effect on his livelihood and the appellant [Mr Pal] should have been given an opportunity to address the Commission: at 5

7.35 The Court concluded that the Commission 'has to exercise its discretion as to whether the penalty is likely to affect the officer's livelihood', and 'the manner in which such discretion is exercised is a matter the courts may examine on judicial review': at 5

7.36 In *Pal v. Public Service Commissioner* the Court of Appeal then pointed out that neither it, nor the High Court, was able to determine how the discretion had been exercised, because the written information sent to Mr Pal referred to penalty only, and not to the findings. Hence, the Court could not know if the penalty resulted from a finding that Mr Pal was guilty of only one of the offences or all of them:

It cannot be assumed that as the penalty ordered was the most severe available to the Commission, it must have found him guilty of them all.

7.37 Because there was no way of knowing whether the submissions in mitigation had been applied relevantly – because there was no way of knowing whether all or some of the charges had been found proven – the Court of Appeal upheld the ground that the right to be heard on penalty was not clearly exercised.

7.38 In the present case, there are no charges. Further, the decision to terminate Mr Prasad's employment/service may be assumed to have been made on the basis that all the alleged breaches raised in the DEN's Memorandum were considered 'proven' or 'admitted to' because Mr Prasad had not specifically responded within the seven (7) days provided. However, in my view this is not good enough.

7.39 Mr Prasad has a right to know which of the alleged breaches or whether all of them were the basis for his employment/service termination. More than this, there are, first, the matters adverted to in grounds set out above, as to the right to be heard and a right to a fair hearing. Secondly, specifically on the matter of penalty, Mr Prasad does not know whether the decision to terminate relates to all four matters set out in the DEN's Memorandum, or to some of them, or to them as a collective breach: not only did he not have a right to be heard on penalty prior to the penalty's being imposed; after the penalty was imposed he had no way of sensibly addressing the question of penalty because he did not know how it was founded.

7.40 Mr Prasad is in a sense in a similar position to Mr Pal – although Mr Pal was more advantaged because his lawyer was heard on penalty, at least to the extent as acknowledged by the Court (albeit the Court held this was insufficient).

**7.41 Mr Prasad has not been heard on penalty at all, nor been extended that opportunity. He was therefore denied natural justice or procedural fairness in this respect. This ground is upheld.**

7.42 (d) *Irrelevant matters taken into consideration – section 56(c)*: The Applicant says that section 56(c) does not apply to his case, because he has never been charged. The Applicant says that the Respondents have, therefore, taken into account an irrelevant consideration in terminating Mr Prasad's employment.

7.43 Conditions and Rules of Employment for Government Unestablished Employees include a provision covering the procedure to be followed for 'major offences'. Section 56 provides:

### **Discipline Procedure for Major Offences**

- (a) If a Head of Department, or any employee acting properly with the authority of the Head of Department has reason to believe that an employee has committed a disciplinary offence, which the Head of Department regards as a minor offence (or one of a series of minor offences which should be treated as a major offence), he/she shall charge the employee with having committed the alleged offence and shall forthwith serve the employee with a written copy of the charge against him/her and the particulars of the alleged offence, in which event the following provisions will apply.
- (b) The employee charged shall by notice in writing be required to state in writing within a reasonable time to be specified in such notice whether he/she admits or denies the charge and shall be allowed to give the Head of Department an explanation if he/she so wishes.
- (c) Where an employee fails to state in writing under sub-paragraph (b) above whether he/she admits or denies the charge, he/she shall be deemed to have admitted the charge.
- (d) The Head of Department shall require those persons who have direct knowledge of the allegation to make written statements concerning it.
- (e) The Head of Department shall as soon as possible without delay deal with the matter taking into account the relevant documents and the charge on the matter and of any reply thereto to arrive at a prompt decision.
- (f) Any employee aggrieved by a decision shall follow the steps set out in the Grievance Procedures contained in this Agreement.

7.44 In the memorandum of 20 March 2007 headed 'Termination of Service', the DEN refers to section 56(c). Observing that Mr Prasad was 'given seven (7) days to respond' to his memorandum of 5 March 2007 and that 'no clarification has been forthcoming from [Mr Prasad's] end to date', the DEN then says that under the Conditions and Rules of Employment section 56(c) 'where an employee fails to state in writing under sub-paragraph (b) above whether he/she admits or denies the charge, he/she shall be deemed to have admitted the charge'.

7.45 It is upon that basis that Mr Prasad's services are said to be 'terminated with immediate effect'.

7.46 Nothing in the memorandum of 5 March 2007 indicates that Mr Prasad has been charged or is being charged with offences. The memorandum calling for an 'Explanation' simply states, as noted, 'it has been brought to my attention that you had breached the following procedures' and then lists the four (4) items and finally asks for an explanation to arrive within seven days.

7.47 Mr Prasad cannot be taken from that memorandum to have understood that he was charged. Nor can that memorandum be accepted as a document stipulating charges as required

under section 56. The Notice of Opposition filed by the Respondents on 20 September 2007 acknowledges no charges have been laid, stating amongst other matters:

- 'the disciplinary process is still in the process';
- 'the disciplinary process has not been completed';
- 'thereafter the DEN will decide whether to lay disciplinary charges against the Applicant or uplift the suspension' –
  - 'if the DEN decides to lay disciplinary charges then the matter shall proceed to a disciplinary hearing;
  - 'if DEN decides not to lay charges and uplift the suspension, the applicant will be notified accordingly';
- 'the disciplinary processes ... is still pending'.

7.48 In submissions before the Court, Counsel for the Respondents stated her advice from the Respondents as being that no charges have yet been laid but that she was informed that charges will be laid soon.

**7.49 On all the material before the Court, it is clear that Mr Prasad has not been charged and, hence, section 56(c) is not germane to Mr Prasad's circumstances and was not at the time of his termination. This means that an irrelevant consideration was taken into account by the DEN in terminating Mr Prasad's employment. This ground is upheld.**

7.50 (e) *Relevant matters not taken into consideration – explanations/advices of Autar and Sharma:* The Applicant says that the Respondents did not take into account the explanations given by Ram Autar and Haridayal Sharma.

7.51 As noted, Mr Ram Autar responded to the first memorandum dated 5 December 2006 which was directed to him by the DEN and which raised the subject of 'Irregularities in Pay Office'. That memorandum does not raise all the matters listed in the memorandum of 5 March 2007, however, it does appear to canvass some of them. Mr Autar responded to all the matters raised in that Memorandum. On 26 January 2007, Mr Sharma also responded with a letter to the DEN. As noted earlier, there does not appear to be any indication that Mr Autar or Mr Sharma's explanations or advices were taken into account by the DEN or even read or noted.

7.52 Albeit not directly touching upon all the matters raised by the DEN in the memorandum which preceded Mr Prasad's termination of employment or 'service' by the memorandum of 20 March 2007, it is apparent from the whole of the documentation before the Court and the history as set out herein (para 1ff) that those explanations or advices were 'relevant considerations' in the matter of Mr Prasad's termination.

7.53 The Respondents have not said that Mr Autar or Mr Sharma's explanations or advices were taken into account.

**7.54 The material before the Court shows that in terminating Mr Prasad's employment/service whilst not taking into account the explanations or advices provided by Mr Ram Autar on 21 December 2006 and Mr Haridayal Sharma on 26 January 2007, the Respondents failed to take into account a relevant consideration. This ground is upheld.**

7.55 (f) ***Relevant matters not taken into consideration – Applicant had no access to documents/work records:*** The Applicant says that the Respondents did not take into account that when he was asked by the Memorandum of the DEN to explain, he was not at work so had no access to relevant documents and work records. Hence, he was unable to provide an explanation by reference to them.

7.56 Arguably, Mr Prasad had the capacity to respond to the DEN's Memorandum for he could be presumed to have copies of his earlier missives providing explanations to the matters raised by the earlier Memoranda. In response to this however, it can be said that fairness requires a person to be able to consult relevant documentation to ensure that his/her explanation conforms to the precise questions asked or issues raised. Mr Prasad could have responded to the DEN in these terms, however, taking into account the history and matters referred earlier, Mr Prasad may not be blamed for forming a view that this would not satisfy the Respondents. His earlier explanation to the Acting Accounts Officer had not, as noted, apparently been taken into account.

**7.57 On balance, and having regard to the whole of the circumstances, in making the decision to terminate his employment when not taking into account that Mr Prasad had no access to relevant documents or work records to provide an explanation, the Respondents did not act fairly. This ground is upheld.**

7.58 (g) ***Relevant matters not taken into consideration - Applicant's period of employment and clean record:*** The Applicant says that making the decision whether or not to terminate his employment/service the Respondents should have taken into account his period of employment and his 22 years constituting a 'clean record'.

7.59 It is axiomatic that in considering whether or not to terminate an employee's employment, both length of service and prior record should be taken into account. This is particularly so where as here the employee has been in the service of the employer for some 22 years: Mr Prasad commenced his employment with the Respondents in 1985; the purported termination took place in 2007.

7.60 Not only length of service is relevant, but also as the Applicant says, that his record was unblemished or 'clean'. This appears to have been recognised by the Respondents, in that the Memorandum of 26 January 2007 (Annexure 'E') acknowledged Mr Prasad's employment since 1985 and concluded:

Thank you for the loyal and dedicated services rendered during your period of employment with the Department.

7.61 This related to the termination which said that the Ministry had insufficient funds to continue Mr Prasad's employment, and that employees in his category were being terminated. This termination was subsequently revoked.

7.62 Albeit in January 2007 the Respondents recognised Mr Prasad's 'loyal and dedicated services' from 1985 and thanked him for it, there is no reference to it in the subsequent material and in particular in relation to the termination of 20 March 2007 – barely two months later.

**7.63 There is no indication in the material before the Court that in the termination the subject of the present application either Mr Prasad's length of service, or his clean or unblemished record (for 22 years) was taken into account. This ground succeeds.**

7.64 (h) *Relevant matters not taken into consideration - section 56(c) applies only where charges are laid:* As earlier observed, the material and the submissions of the Respondents confirms that no charges have yet been laid as against the Applicant; as at the date of termination no charges had been laid.

7.65 As no charges had been laid at the date of termination, section 56(c) was irrelevant to whether or not Mr Prasad's employment/service should be terminated. This ground is upheld.

7.66 (i) *Relevant matters not taken into consideration - nature of alleged breaches not serious:* In *Public Service Association v. Kotobalavu* [2004] FJCA 51; ABU0031.2004S (11 November 2004) the Court of Appeal observed that the charges laid against Mr Kotobalavu were 'vague' and ought to have been properly formulated in accordance with the Public Service Act and the Regulations. Many breaches were alleged and for six counts a breach was alleged also in respect of another subsection of the Public Service Act. The Court further noted:

The fact that the allegations were 'very serious in nature' was flagged by the Appellant [Public Service Association] in its correspondence with the Respondent [Mr Kotobalavu], on more than one occasion; and the fact that the penalty imposed was one of termination of employment, only supports the fact that this is how the case was seen by the [Public Service Association] from the outset: at 13

7.67 Some of the breaches alleged amounted to criminal offences under the Public Service Act: at 13 In these factors, breaches of natural justice were found for Mr Kotobalavu and upheld by the Court of Appeal.

7.68 For Mr Prasad it may be argued that, unlike Mr Kotobalavu, he did not have flagged to him in correspondence on more than one occasion that the allegations against him were 'very serious in nature' and hence the alleged breaches are not 'serious', and that this should have been taken into account by the Respondents in making the decision whether or not to terminate his employment/service.

7.69 A difficulty for Mr Prasad in regard to this ground is that the Memorandum of 2 February 2007 (replacing the Memorandum of 31 January 2007) characterised the conduct for which Mr Prasad was told he was 'hereby suspended without wages with immediate effect pending investigation' as 'fraud': 'falsifying official records and documents, purporting to defraud the State ...' The earlier Memorandum (31 January 2007) referred to 'falsifying official records and documents ... and misleading management ...': Annexure 'G'

7.70 'Fraud' is generally considered to be a serious breach of an employee's responsibilities and conduct.

7.71 On the other hand, 'fraud' is not referred to in the Memorandum of 5 March 2007 which founded the purported termination.

7.72 It may nonetheless be argued that:

- whether or not the Respondents used the term 'fraud', the Memorandum outlined allegedly fraudulent behaviour or conduct on the part of the Applicant;
- this was drawn to his attention in the 2 February 2007 Memorandum; and
- the Respondents therefore characterised the conduct as serious,

so that Mr Prasad cannot rely upon a proposition that the nature of the alleged breaches is not serious.

7.73 Contradicting this, however, is that the very Memorandum referring to 'defrauding the State' confirms the DEN's action as being to *suspend* Mr Prasad only – not to terminate his employment. Upon that basis, as at that date those breaches – which include the same breaches as are alleged in the later Memorandum founding the termination – were not considered by the Respondents to be of such a serious nature as to warrant termination or at least immediate termination. They warranted at that stage suspension only (albeit pending investigation).

7.74 The Memorandum of 2 February 2007 with its title 'Suspension' replaced the Memorandum of 31 January 2007 headed 'Termination'. Thus the lesser description of Mr Prasad's alleged conduct which by the heading of the Memorandum warranted 'termination' (but which in the body referred similarly to suspension), was replaced by a stronger description of Mr Prasad's alleged conduct now with the heading 'Suspension' (consistent with the last paragraph of both Memoranda).

**7.75 This can properly, it appears to me, be taken as supporting the Applicant's contention that the 'nature of the alleged breaches is not serious' – or at least, not so serious as to warrant instant termination or termination without investigation. Upon the basis of the Respondents' own documentation therefore, this ground is upheld.**

7.76 (j) *Relevant matters not taken into consideration – legitimate expectations of applicant:* As to 'legitimate expectations' *Aronson, Dyer and Groves on Judicial Review of Administration Action*, 3<sup>rd</sup> edn, Law Book/Thomson Regulatory, Sydney, NSW, Australia, 2004, say:

Consideration of 'likely expectation' have been important in some of the decisions in which legitimate expectation has been used to extend the reach of procedural fairness ... It must be correct ... that likely expectations can have a bearing on procedural fairness. Such expectations will generally be important in determining what 'fairness' requires in the circumstances. Taking account of such expectations may also be important in order to maintain public confidence in the decision-making process ...: p. 400

7.77 That is, not only 'legitimate expectations' in terms of what an applicant believes and knows of his own circumstances and his 'rights', but in terms of what s/he would have expected, or been entitled to expect, had s/he known of the existence of particular matters which ought properly be taken into account: for example, as in *Minister of State for Immigration and Ethnic Affairs v. Teoh* (1995) 183 CLR 273 where the parties affected by the decision would not have known of the existence or content of the United Nations Convention on the Rights of the Child.

7.78 Whether they were likely expectations (and hence 'legitimate' in judicial review terms) or legitimate expectations in the sense of Mr Prasad's *knowing* and *believing* they should have been taken into account or that he had a right to have them taken into account, the following can fairly be taken as giving rise to a legitimate expectation on the Applicant's part that:

- they would be taken into account; and
- they would not be ignored in the decision whether or not to terminate his employment/service:
  - his position as a long-term employee;



- his 'clean' record of employment;
- his having responded to the matters raised previously – per his letter/Memorandum of 26 January 2007;
- the responses of Mr Autar and Mr Sharma to the matters raised previously (albeit they did not 'name' him as responsible);
- his response to the Memorandum of the Acting Accounts Officer;
- his not having access to documents and work records in order to provide an explanation;
- that the nature of the matters previously warranted suspension only.

7.79 Mr Prasad's being confronted by the series of contradictory memoranda addressed to him over the period leading up to the memorandum of termination may have made him apprehensive of being extended procedural fairness. Similarly as to the apparent failure of the Respondents to take into account those previous responses and particularly his response to the Acting Accounts Officer's Memorandum raising the same issues (albeit in shortened form) as raised in the DEN's Memorandum. However, that he may have been so apprehensive does not deny Mr Prasad's right to a legitimate expectation as to those matters listed being taken into account.

7.80 Indeed, that he was subjected to the contradictory series of missives should in all the circumstances be accepted as leaving him with a legitimate expectation that, nonetheless, he should be extended procedural fairness and all those matters should be taken into account by the Respondents when making the decision whether or not to terminate his employment. That he considered himself to be being 'victimised' by the conduct of the Respondents should not deprive him of a right to a legitimate expectation that despite this, he should and would be treated fairly, with due regard to natural justice. Otherwise, the worse the conduct of an employer, the more an employee is deprived of rights per the legitimate expectations principle.

**7.81 On balance, in making the decision on or about 20 March 2007 to terminate Mr Prasad's employment/service, the Respondents acted in breach of the Applicant's legitimate expectations. This ground is upheld.**

## **8. Exhausting Remedies?**

In *Public Service Association v. Kotobalavu* [2004] FJCA 51; ABU0031.2004S (11 November 2004) the Court of Appeal affirmed the 'cardinal principle of administrative law that, save in exceptional circumstances, judicial review is not available where an applicant has failed to exhaust a suitable alternative remedy that is available': at 16

8.1 The Court cited also *The State v. The Ministry of Labour & Industrial Relations and Attorney General of Fiji; Ex parte Fiji Mineworkers Union* (High Court Jud. Rev. No. 1 of 1998S)

8.2 In *Kotobalavu* the Court referred to *Reg v. Panel on Take-Overs and Mergers; Ex parte Guinness PLC* (1990) 1 QB 146:

It is not the practice of the court to entertain an application for judicial review unless and until all avenues of appeal have been exhausted, at least insofar as the alleged cause for complaint could thereby be remedied. The rationale for this self-imposed fetter upon the exercise of the court's jurisdiction is twofold. First, the point usually arises in the context of statutory schemes and if Parliament directly or indirectly has provided for an appeals procedure, it is not for the court to usurp the functions of the appellate body. Second, the public interest normally dictates that if the judicial review jurisdiction is to be exercised,

it should be exercised very speedily and, given the constraints imposed by limited judicial resources, this necessarily involves limiting the number of cases in which leave to apply should be given: at 177, per Lord Donaldson MR; cited at 16

8.3 Does Mr Prasad have an alternative to judicial review?

8.4 In my opinion, he does not: no charges have been laid against him – according to Counsel for the Respondents they will be laid ‘soon’. If the Memorandum of 24 July 2007 is taken into account, namely the ‘Revocation of Termination’, then ‘disciplinary procedures’ have been pending since that date and have not yet been instituted:

... Your suspension without wages however, still stands pending the Disciplinary procedures.

You will be advised on further proceedings in due course.

8.5 Mr Prasad is still waiting.

8.6 So long as there are no charges and no disciplinary procedures instituted, Mr Prasad has no remedy through the Public Service process. In any event, going through the Public Service process would not satisfy the situation confronting Mr Prasad, which is that his employment/service was terminated by his employer on 20 March 2007.

#### 9. Moot Proceedings or ‘Academic’ Question Not Susceptible to Review?

I turn, then, to the submission by the Respondents that as Mr Prasad stands suspended, his termination revoked, the processes leading to and circumstances of that termination are no longer susceptible to judicial review because the issue is moot or ‘academic’.

9.1 This question was addressed in *Public Service Association v. Kotobalavu*. There, the employee had elected to resign his position, taking up alternative employment. The Public Service Association submitted upon that basis that the relief sought was of no practical value and, for that reason, the application should have been dismissed. The Public Service Association relied upon *Sun Life Assurance Company of Canada v. Jervis* (1944) AC 111:

I do not think that it would be a proper exercise of the authority which this House possesses to hear appeals if it occupies time in this case in deciding an academic question, the answer to which cannot affect the respondent in any way. If the House undertook to do so, it would not be deciding an existing *lis* between the parties who are before it, but would merely be expressing its view on a legal conundrum which the appellants hope to get decided in their favour without in any way affecting the position between the parties ... I think it is an essential quality of an appeal fit to be disposed of by this House that there should exist between the parties a matter in actual controversy which the House undertakes to decide as a living issue: at 113-14, per Viscount Simon LC, cited at 19

9.2 It was observed, however, that (along with *Ainsbury v. Millington* (1987) 1 WLR 379, also cited by the Public Service Association) the case involved disputes as to private rights. As an alternative, the Court of Appeal cited *Reg v. Board of Visitors of Dartmoor Prison* (1987) QB 106, and *Reg v. Secretary of State for the Home Department* (1966) 1 WLR 298 where the Court of Appeal and House of Lords respectively held that were questions of general public interest or of fundamental importance arose, it was appropriate to hear the proceedings: at 19

9.3 As noted earlier, the Respondents relied upon *Reg v. Secretary of State for the Home Department: Ex parte Salem* (1999) 1 AC 450 where Lord Slynn (which with the remainder of the Lords agreed) said that a court has a discretion to hear disputes 'even if by the time the appeal reaches this House there is no longer a *lis* to be decided which will directly affect the rights and obligations of the parties *inter se*'.

9.4 However, in *Kotobalavu* the Court of Appeal held that there was good reason for going ahead to hear the matter, despite the employee having gone to another position and hence his termination from employment (which was the subject of the proceeding) being no longer directly in issue, at least to the extent that he had the alternative post. The Court said:

Whilst it is the fact that, by the time that [the hearing] arrived, the Respondent had moved on, this case could not have been dismissed on so narrow a proposition.

9.5 There are two ways in which the issue was neither moot, nor one the determination of which lacked a practical utility. First, and foremost, while the termination decision stood, the Respondent was a person who went forward with an entry on his record of having been dismissed from the Public Service of Fiji, as the result of findings of multiple breaches of the Code of Service, some of which, having regard to the multiplicity of breaches alleged under each count, could only have been regarded as seriously reflecting on his honesty and integrity. This was not aided by the continuing uncertainty as to which of the very many allegations that were encompassed within each count, had in fact been made good. There was a practical utility for him in having his name cleared, since the presence of such an entry on his record may well have affected him in public life, and in seeking future employment, whether in the civil service, or in the private sector: at 20

9.6 The Court cited *Peters v. Davidson* (1993) 3 NSLR 744, where it was held '... judicial review was justified to correct an error of law which materially affected a matter of substance relating to a finding, particularly where the error damaged the reputation of the person directly concerned in the inquiry': cited at 20

9.7 In addition, the Court observed that if the termination decision was quashed there was a payment due to him of his salary between the date of termination and his obtaining another position. Albeit this was 'of less importance and probably insufficient of itself', it was nonetheless considered relevant.

9.8 The Respondents would say that Mr Prasad's record is not blemished by a termination, for the termination has been revoked and he is suspended only. However, the termination Memorandum remains on his record and the history leading up to that termination, with the allegations made against him and upon the basis of which the termination took place remaining. Mr Prasad remains in a position where he suffered the ignominy of termination and the consequent impact upon reputation and standing in the community, as well as psychological impact, of the termination.

9.9 This is consistent with the Court of Appeal's view in *Kotobalavu*, albeit there Mr Kotobalavu had moved on to another position. There is no evidence or contention that this (securing another position) has occurred for Mr Prasad. The impact of being terminated in the circumstances and according to the history set out in the material before the Court is a factor that cannot be overlooked.

9.10 Further, as Mr Prasad did not receive the Memorandum advising him of the revocation of termination and substitution of the previous suspension (per his Affidavit in Response, filed 3 June 2008, para 8 in response to para 13 of the Respondents' Affidavit in Reply), he continued in a position of believing his termination stood, and being obligated to present himself to the world (and his family, colleagues, acquaintances and friends) according to that status. In my opinion, this is both a predictable and foreseeable consequence of his employment's having being terminated.

9.11 Additionally, to date Mr Prasad has not been given the opportunity to respond to those matters in the context of the suspension, so that there remains no way in which he has been able to clear his name, if that is what he can do in the future, or at least to endeavour to clear his name. He has been given no opportunity to do so and no firm information has been provided as to precisely when he might be extended one.

9.12 Although the Respondents have advised through their Counsel that a disciplinary process is to be commenced which charges 'soon', this Court should not in my opinion refuse the Applicant the opportunity to be heard and to gain a determination in the present proceeding, on the basis that sometime soon Mr Prasad will have an opportunity to respond to charges in an alternative proceeding, in another forum.

9.13 The Respondents rely upon the proposition (as put by Lord Slynn in *Reg v. Secretary of State for the Home Department; Ex parte Salem* (1999) 1 AC 450, at 456-57) that there must be 'a good reason in the public interest' for hearing a dispute which is 'academic'.

9.14 Here, there is good reason in the public interest for hearing and determining on the present dispute:

- For the reasons as aforesaid, going to Mr Prasad's record and to the uncertainty as to timing of any opportunity that may be extended to him to answer charges through the Public Service process; and
- Because the flaws identified in the process preceding the termination of Mr Prasad's employment/service require identification in the public interest: it is in the public interest both in relation to the employee concerned, Mr Prasad, and for the purposes of the Respondent in taking steps to ensure that in the future its processes are not so flawed.

9.15 Further, as Counsel for the Applicant observed, the judicial review relates to the 20 March 2007 termination of employment, so that it is to that date that the Court must address itself. Leave was granted on that basis and at that time no indication was given by the Respondents that the termination had been revoked and the suspension revived to replace it.

9.16 Therefore Mr Prasad is entitled to have his judicial review application heard and determined upon the basis of the material before the Court.

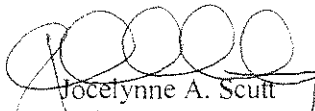
## **10. Further Matters**

The Applicant seeks, amongst other orders, damages and indemnity costs. No submissions were made as to the level of damages or how damages should be calculated. If the Applicant wishes to pursue the question of damages, then short written submissions should be filed and served, with the Respondents filing and serving short written submissions in reply.

10.1 As to indemnity costs, the Applicant should file and serve a short schedule of costs so that an appropriate level of costs can be awarded. I shall include an order for liberty to apply should the parties wish to have the these two aspects or any one of them listed for a short hearing subsequent to the filing and serving of the aforesaid material.

**DECLARATION AND ORDERS**

1. An Order of Certiorari is issued in respect of the decision made on or about 20 March 2007 by the Divisional Engineer Northern and/or Ministry for Transport, Works and Energy purporting to terminate the Applicant's employment/service and the decision is quashed.
2. A Declaration is issued in respect of the decision made on or about 20 March 2007 by the Divisional Engineer Northern and/or Ministry for Transport, Works and Energy that they or any one of them acted in breach of the Applicant's legitimate expectations.
3. In respect of the claim for damages, the Applicant to file and serve short written submissions on or before 31 July 2008, and the Respondents to file and serve any short written submissions in reply on or before 14 August 2008.
4. In respect of the claim for indemnity costs, the Applicant to file and serve a short schedule of costs on or before 31 July 2008, and the Respondents to file and serve any reply on or before 14 August 2008.
5. Liberty to apply.

  
Jocelynn A. Scutt  
Judge  
Suva  
17 July 2008

