IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

CASE NUMBER: **HBJ 2 OF 2012**

BETWEEN : **THE STATE**

AND : **THE PERMANENT SECRETARY FOR WORKS, TRANSPORT & PUBLIC UTILITIES**

RESPONDENT

PUBLIC SERVICE COMMISSION

INTERESTED PARTY

EXPARTE : **RUSIATE TUBUNARUARUA and OTHERS**

APPLICANTS.

Appearances: **Mr. R. P. Chaudhry for the Applicants.**

Mr. S. Sharma and Mr. R. Green for the Respondent and Interested Party.

Date / Place of Judgment: **Monday 22 April 2013 at Suva.**

Coram: **The Hon. Justice Anjala Wati.**

RULING

CATCHWORDS:

LEAVE TO APPLY FOR JUDICIAL REVIEW – DECISION CHALLENGED IS THE TERMINATION OF CONTRACTUAL EMPLOYMENT – WHETHER CONTRACT PROVIDES FOR REMEDIES TO BE FOLLOWED – USE OF INTERNAL REMEDIES PROCEDURE – ARE CONTRACTUAL EMPLOYMENT WITHIN THE REALM OF PUBLIC LAW – APPOINTMENTS MADE BY PUBLIC BODY – THE TEST FOR DECIDING WHETHER PUBLIC LAW OR PRIVATE LAW SHOULD APPLY – IS

JUDICIAL REVIEW AVAILABLE – SHOULD THE COURT GO INTO THE QUESTION WHETHER THERE IS AN ARGUABLE CASE IN THE CIRCUMSTANCE OF THE CASE.

LEGISLATION:

THE HIGH COURT RULES 1988: ORDER 53.

CASES:

Regina v. Secretary of State for the Home Department, Ex parte Swati [1986] 1 WLR 477.

R v. Epping and Harlow General Commissioners, ex parte Goldstraw [1983] 3 All ER 257.

R v East Berkshire Health Authority, ex parte Walsh [1984] 3 All ER 425.

State v Ministry of Education and the Attorney General, ex parte Ravndra Singh (unreported) Suva High Court Judicial Review Case Number 0042 of 2006.

Ministry and the Permanent Secretary for the Ministry for Education and the Attorney General v. Amrit Prakash (unreported) Court of Appeal of Fiji Islands Case Number ABU 0032 of 2009.

The Cause

1. On 12 December 2012 and 14 February 2012 the applicants' were terminated from their contractual employment pursuant to the *Terms and Conditions of Employment for Government Wage Earners* ***("The JIC Agreement")***.

2. The basis upon which the applicants' were terminated were that a thorough investigation by the employer revealed that the applicants' were involved in a *"sick sheet scam"* wherein they were buying sick sheets without being physically examined by a medical practitioner beforehand.

3. The applicants' are seeking leave to apply for judicial review of the decision to terminate them. It is also sought that the leave operate as a stay of the decision to terminate.

The Grounds for Relief

4. The application for leave is based on the grounds that the respondent:

(a) *exceeded his jurisdiction;*

(b) *made errors of precedent fact, made fundamental errors of findings unsupported by evidence;*

(c) *failed to sufficiently acquaint itself with relevant information and/or failed to properly address the same;*

(d) *failed to act and/or exercise his powers so as to promote the purpose for which the powers upon it were conferred;*

(e) *did not follow prescribed processes and procedures in the JIC Agreement and therefore acted unlawfully in terminating the applicants;*

(f) *acted so unfairly as to abuse his powers and unjustifiably defeated the applicants' legitimate expectations.*

(g) *failed to have regard to all, and to only, legally relevant considerations and took into account irrelevant ones;*

(h) *acted unreasonably and/or irrationally and/or in a way which was not open to him;*

(i) *acted inappropriately and in a way not necessary to achieve a legitimate aim;*

(j) *acted beyond his jurisdiction and unlawfully;*

(k) *failed to adopt the prescribed procedures and give the applicants a fair and informed say; and*

(l) *failed to give adequate reasons.*

5. The substantive reliefs sought are for :-

(a) *An order of certiorari to remove and quash the decision of the respondent;*

(b) *An order for mandamus directing the respondent to immediately reinstate the applicants' to their respective positions of employment without any loss of wages and or benefits or alternatively direct the respondent to continue to pay the applicants' their wages and benefits from the date of termination until the matter is determined;*

(c) *A declaration that the respondent acted unlawfully and beyond its jurisdiction and contrary to the legitimate expectation of the employees; and*

(d) An order prohibiting the respondent from interfering, intimidating or maligning the applicants'.

The Opposition

6. Mr. Sharma raised three grounds of opposition. His first ground was that the applicants' have failed to exhaust the alternative remedy of appeals procedure available to them under clause 73(d) of the JIC Agreement and as such the Court should not entertain the application for judicial review. It was contended that the applicants' profess that the procedures in clauses 29 and 30 of the JIC Agreement was not followed. Clauses 29 (f) and 30 (f) indicates that any employee who is aggrieved at the decision shall follow grievance procedure under the JIC Agreement. The grievance procedure is laid down in Part XIII which lays down the procedure for appeal against all such grievances including terminations. The process includes the exhaustion of appeal mechanisms through various avenues, including an appeal to the interested party. In addition, it was argued that clauses 29 and 30 of the JIC Agreement are to be read in conjunction with Part XI which contains disciplinary procedures. Clause 73(b) of the disciplinary procedures further substantiates clauses 29 and 30. The applicants' have bypassed all this internal remedies and have come to Court which must turn the applicants' away to follow the procedure they agreed to go through when they entered into the contract.

7. Mr. Sharma's second ground of opposition is that the decision challenged is not amenable to judicial review. The applicants' appointments are made pursuant to a contractual agreement and so all appropriate remedy within the realm of private law than public law must be sought. Mr. Sharma reinforced his argument with elaboration on the distinction between permanent employees and those who are contractually employed. He stated that the permanent employees' are engaged under the Public Service Act and Regulations and there is a statutory underpinning to the employment but in the case of the applicants', although they are employed by the public body, their engagement was under a contract and as such private law remedies must be resorted to.

8. Mr. Sharma further argued that even if the letters of appointment that were issued to the applicants' imported various statutory regulations and provisions, the contract still

remains a private one and judicial review will not be made available. Mr. Sharma stated that there are situations where the Courts have been prepared to superimpose public law principles onto contractual situations and to ensure the observance of those principles by way of judicial review. Mr. Sharma however argued that the present case is not one of these contractual situations where the Court ought to impose public law remedies. This is simply because there are no statutory underpinnings in the termination of the contractual employment of the applicants'. The respondent did not exercise a power conferred under a statute.

9. The third ground of opposition raised by Mr. Sharma was that there is no arguable case warranting leave. Mr. Sharma argued that the respondent did not exceed its jurisdiction in terminating the employment of the applicants'. Mr. Sharma stated that 3 procedures are prescribed for termination of a government wage earner which can be invoked separately and distinctively by the Permanent Secretary or the Head of Department. They are:

   (a) Clauses 29 and Clause 30 under Part X – Discipline, stipulates the disciplinary action that can be taken against any Government Wage Earner for major and minor offences, with the laying of disciplinary charge, investigation and the imposition of penalties prescribed under Clause 33.

   (b) Clause 73(ix), a Government wage earner can be summarily dismissed or his employment terminated for gross misconduct.

   (c) Clause 78(a), the appointment of a Government wage earner can be terminated by giving one week's notice or by payment of one week's pay in lieu. This authority is also contained in the appointment letters of all Government wage earners.

10. Mr. Sharma argued that since the termination was under clause 78(a) no procedure had to be followed. The investigation was conducted as there is no prohibition under clause 78(a) to conduct an investigation. Termination is permitted as of right under the contract.

11. The applicants' had all admitted the allegations. The seriousness of the allegations, the quantity of the employees and the need for an informed decision triggered the investigations.

12. Mr. Sharma further argued that the appointments of a number of applicants' were fixed term temporary appointments which had expired. Secondly the terminations occurred

upon investigation. The least the applicants' are entitled to, if they pursue the remedy, is one weeks' notice or payment in lieu.

Submissions in Response

13. Mr. Chaudhry argued that the alternative remedy could not be exhausted under clause 73(d) as Mr. Kean himself did not follow the disciplinary procedures enshrined in clauses 29 and 30 to dismiss the applicants'. If clauses 29 and 30 were complied with, the applicants' would have then followed the alternative remedies.

14. On the aspect of whether the decision is amenable to judicial review, Mr. Chaudhry argued that the Public Service Commission appointed the applicants' pursuant to the Public Service Act 1999. There is a statutory underpinning to the employment of the applicants'. The JIC agreement, it was argued, does not stand alone; it makes references to the Public Service Act and Regulations as well so the appointment of the applicants' is pursuant to a statutory enactment.

15. Mr. Chaudhry argued that a wage earner is defined as a person employed in the public service by reference to a rate of remuneration or payment other than an annual fee. The applicants' were permanent wage earners and there is no evidence before the Court to show that they were employed as project workers.

16. Mr. Chaudhry said that he clearly has an arguable case in that the applicants' were denied the disciplinary procedures under the JIC agreement and there was obvious breach of natural justice.

17. Mr. Chaudhry further relied on the case of ***Fiji Television Limited and Minister for Communications, Works and Energy (unreported) High Court Judicial Review Case No. HBJ 0039 of 1997*** to state that the principle enshrined in this case was that even where a power is essentially contractual, the presence in a given case of an additional statutory element or even the exercise of a general governmental policy might possibly convert a contractual private law issue into one of public law. He also used this case for the preposition that it is clear from this case that the Courts have been prepared to superimpose public law principles onto contractual situations, and to ensure the

observance of those principles by way of judicial review. They are prepared to do this even if the effect of granting a public law remedy is to vary the rights under a contract.

18. Mr. Chaudhry further argued that this is a case where there was non-compliance of procedural fairness and as such this must be subject to judicial review.

The Preliminary Objection

19. The interested party raised an issue that it should not have been named as a party to the proceeding on the basis that it did not make the decision which is subject to review.

The Law and Analysis

20. I will first of all deal with the preliminary objection. The established law is that only a decision maker's decision is amenable to judicial review. In my earlier judgment in this case delivered on 23 March 2012, at paragraph 23 I found that the decision was made by the interested party and executed by the respondent. On that basis I hold that the interested party had made the decision and there is no cause to discharge it from the proceedings.

21. I will now analyse the application for leave based on the grounds of opposition, for if it fails, leave ought to be granted.

22. The first question is that of use of the alternative remedies.

23. It is undisputed that most employees were under a temporary appointment for a fixed period. They were appointed by the Ministry of Works, Transport and Public Utilities and their terms of appointment were governed by the JIC Agreement. S.73(d) of the agreement states that:

"appeals against ...dismissal shall be processed through the grievance procedures as spelt out in this agreement between the secretary for the Public Service and the Union".

24. Part XIII of the JIC Agreement contains the grievance procedure.

25. The applicants' have not followed the internal procedure of appeal provided to them by the JIC agreement.

26. Even if the applicants' contention is upheld that the employer should have followed the disciplinary procedures enshrined in clauses 29 and 30 of the JIC agreement, the application for leave will still encounter a hurdle, in that, both the clauses have in its sub clause (f) a procedure for internal remedies to be resorted to. Both clauses 29(f) and 30(f) reads:

"Any employee aggrieved by a decision shall follow the steps set out in the Grievance Procedure under this agreement".

27. It is a cardinal principle that, save in most exceptional circumstances, the judicial review jurisdiction would not be exercised where other remedies were available and had not been used: ***Regina v. Secretary of State for the Home Department, Ex parte Swati [1986] 1 WLR 477; R v. Epping and Harlow General Commissioners, ex parte Goldstraw [1983] 3 All ER 257.***

28. I am not convinced on any material that this is one exceptional case where the Court should exercise a judicial review jurisdiction and bypass all the procedures in the contract of employment.

29. There are hundreds of employees covered under the JIC agreement. It would be a clear misuse of the provisions of Order 53 of the High Court Rules 1988 if all contractual employees were given permission to bring a case for judicial review.

30. The next issue as raised in the opposition is whether the decision is amenable to judicial review.

31. The applicants' employment was governed by the JIC agreement. They were also terminated under the said agreement. It thus puts it beyond question that the rights that the applicants are entitled to are the contractual rights. The contract is an ordinary master and servant contract of employment and the appropriate remedy is in private law.

32. I rely on the case of ***R v East Berkshire Health Authority, ex parte Walsh [1984] 3 All ER 425***. The applicant was employed as a senior nursing officer by the respondent health authority under a contract of employment which, pursuant to the National Health Service

(Remuneration and Conditions of Service) Regulations 1974, incorporated terms and conditions which were negotiated by a recognised negotiating body and approved by the Secretary of State for Social Services. In August 1982 the district nursing officer suspended the applicant from duty and on 27 September she purported to terminate his employment with the health authority. The applicant sought judicial review of the dismissal, on the grounds that the district nursing officer had acted ultra vires in dismissing him and that there had been breaches of the rules of natural justice in the procedures leading up to the dismissal. The health authority raised the preliminary point whether it was appropriate for the applicant to question the dismissal by bringing proceedings for judicial review. The judge held that the applicant's rights were of a sufficiently public nature to entitle him to seek public law remedies. The decision went on appeal. On appeal it was held:

"Whether a dismissal from employment by a public authority was subject to public law remedies depended on whether there were special statutory restrictions on dismissal which underpinned the employee's position, and not on the fact of employment by a public authority per se or the employee's seniority or the interest of the public in the functioning of the authority. Where the authority was required by statute to contract with its employees on specified terms with a view to the employees acquiring private law rights, a breach of that contract was not a matter of public law and did not give rise to any administrative law remedies: it was only if the authority failed or refused to contract on the specified terms that the employee had public law rights to compel the authority to comply with its statutory obligations. The fact that the applicant was employed on conditions of service which were negotiated by a negotiating body, were approved by the Secretary of State and were imposed on the applicant and the authority by the 1974 regulations was not sufficient to give the applicant public law remedies in respect of his dismissal. Since the applicant had been engaged on the proper conditions of service and his complaint was that he had been dismissed in breach of those conditions, his contract was an ordinary master and servant contract of employment and the appropriate remedy was the private remedy of a complaint to an industrial tribunal…"

33. The case of ***Ministry and the Permanent Secretary for the Ministry for Education and the Attorney General v. Amrit Prakash (unreported) Court of Appeal of Fiji Islands Case Number ABU 0032 of 2009*** is an apt one for the issue at hand. In this case the respondent

was appointed a primary school teacher by a letter of appointment which was issued by the Public Service Commission. The letter of appointment contained the terms and conditions of appointment. The respondent brought a private law action against the Ministry and the Attorney General for the unlawful reversal of salary and delay for reimbursement of the same. The respondent was successful and awarded damages. The matter went on appeal and one of the contentions at the appellate stage was that the respondent's remedy was in public law. The Court of Appeal rejected the argument and stated that this was a matter of private law as he has entered into a contract of employment by the letter of appointment. At paragraph 16 the Court stated:

"The principles invoking public law remedy in relation to employment are well settled. An employee of a public authority is entitled to invoke a public law remedy in relation to his employment depends on whether there were special statutory restrictions governing the employment or whether there are Regulations or statutory underpinning to the conditions of employment. If not the relationship between the employee and the public body is only a master and servant relationship and it is governed by the respective contract of employment. In this instant case the respondent's employment is not made under any statutory provision or governed by any regulation. He was appointed as a Primary Teacher by the Ministry of Education with the concurrence of the Public Service Commission in terms of the letter of appointment issued to him. The respondent has entered into a contract of employment in terms of the letter of appointment. Any breach of the terms and conditions in the letter of appointment would fall under the realm of private law. Hence I reject…that the remedy that is available to the respondent in the given circumstances is by way of judicial review".

34. I firmly find that this is a case which is not susceptible to judicial review, albeit the fact that the appointing authority is a public body. I reiterate that the applicants' were appointed by the JIC Agreement and terminated under the same. The complaint of a breach of the contract or the JIC Agreement is a matter for the contract law and not suitable for relief under judicial review proceedings.

35. The fact that an employer is a public body or, that there is a degree of public interest in the activities performed by the individual, is not sufficient to make the matter a public law one.

36. Further, the fact that the JIC Agreement makes references to the Public Service Act and Regulations, "*the importation of these provisions does not convert this contract from one which exists in the private law domain into one which is justiciable by way of judicial review. The contract remains a private one. All that has happened is that it states for the purpose of contract law the various acts and regulations which normally apply to established civil servants are imported into this contract*": ***State v Ministry of Education and the Attorney General, ex parte Ravindra Singh (unreported) Suva High Court Judicial Review Case Number 0042 of 2006.***

37. On the question of whether there is an arguable case, I must refrain to go into answering the issue for it is not for me to look into that aspect since I am of the view that this is not a case for judicial review. I may well overstep the mark and predetermine what would or should otherwise be an issue for another time.

38. This is not a case which should have been brought by way of judicial review at all. The respondent has incurred expenses in drafting pleadings and preparing extensive legal submissions with number of authorities. This is one case where costs are truly justified in favour of the respondent and the interested party.

The Final Orders

39. I refuse the application for leave.

40. I order costs against the applicants' in the sum of $1000 to be paid within 21 days.

Anjala Wati

Judge

22.04.2013

To:

1. ***Mr. R. P. Chaudhry for the applicants.***
2. ***AG's Chambers for the respondent and interested party.***
3. ***File: Suva HBJ 2 of 2012.***