

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

**CIVIL NO. HBC 407 of 2006**

**BETWEEN** : Elina Tokaduadua

**PLAINTIFF**

**AND** : Chief Executive Officer – Ministry of Agriculture, Sugar &  
Land Resettlement

**FIRST DEFENDANT**

**AND** : Public Service Commission

**SECOND DEFENDANT**

**COUNSEL** : Mr. A Vakaloloma for the Plaintiff  
Ms. Levaci S with Pickering J for the Defendants

**Date of Judgment** : 8 November 2013

**JUDGMENT**

1. The Plaintiff filed an application by way of originating summons on 12 September 2006 supported by an affidavit sworn on 8 September 2006 seeking redress under Section 29(3) of the Constitution (Amendment) Act 1997 as follows:

“i. Declaration that it is the Plaintiff’s constitutional right to have the five disciplinary charges instigated against her determined and heard within a reasonable time by virtue of Article 29(3) of the Constitution (Amendment) Act 1997.

- ii. *Declaration that the delay of some two years to determine whether the Plaintiff herein had committed the five disciplinary offences which she is alleged to have committed in 2000 is unreasonable, inexcusable delay and therefore a breach of the requirements of Article 20(3) of the Constitution.*
- iii. *An order that the disciplinary proceedings currently being instigated against the Plaintiff be permanent stayed.*
- iv. *Order that the 1<sup>st</sup> and 2<sup>nd</sup> Defendant should now take steps to have the Plaintiff reinstated to her position as Senior Clerical Officer with the Ministry of Agriculture, Sugar & Land Resettlement and that she be paid salary and other increments due to her back dated to the 27<sup>th</sup> of September 2004.*
- v. *Cost on indemnity basis.”*

2. Dr Niumaia Tabukanawai, the Permanent Secretary of Ministry of Agriculture, Fisheries and Forest filed an affidavit in reply sworn on 4 April 2000, in response to the affidavit in support of the Plaintiff.
3. Mr Tom Lee Deputy Secretary, Operations of the Second Defendant filed an affidavit in reply sworn on 28 August 2007 and supplementary affidavit sworn on 7 September 2007, in response to the affidavit in support of the Plaintiff.
4. Both counsel made submissions on 13 December 2007 before Jitoko J reserved this matter for judgment on notice. As Jitoko J was unable to deliver the judgment, this matter was re-listed for hearing before me.
5. At the hearing, it was decided that the following issues need to be dealt with prior to determination of the substantive issue in this matter.

### **Issue for Determination as a Preliminary Issue**

6. *Whether or not the Applicant's application made via originating summons seeking redress falls within the ambit of the Administration of Justice Decree No. 14 of 2010.*
  
7. In my view, it is pertinent to state the chronology of events that led the Plaintiff to initiate proceedings against the Defendants:
  - i. By a memorandum dated 27 September 2004, the Defendants notified the Plaintiff of suspension without salary effective from 28 September 2004.
  - ii. By a memorandum dated 22 November 2004, the disciplinary charges were notified to the Plaintiff.
  - iii. The Public Service Commission by its letter dated 5 November 2004 suspended the Plaintiff from services without pay for alleged breaches of Public Service Code of Conduct.
  - iv. By letters dated 2 December 2004, and 7 April 2005 the Plaintiff wrote to the Defendants and denied all allegations.
  - v. On 14 April 2005, the Defendant issued a copy of the report on investigation to the Plaintiff.
  - vi. On 14 June 2005, duly prepared charges were served on the Plaintiff.
  - vii. Hearing of this matter was adjourned on several occasions at the request of the Plaintiff.
  - viii. On 16 June 2006, the Defendants informed the Plaintiff that a 50% salary would be paid to her pending this determination of the amended charges, backdated to her date of suspension.

8. The counsel for the Defendants contends that the Applicant did not plead or sought reliefs nor amended their originating summons seeking reliefs for termination and any consideration of this matter based on termination would tantamount to an act outside the ambit of issues pertaining to the originating summons.
9. Upon perusal of the originating summons it is abundantly clear that the Plaintiff has come to court after her services were suspended and to seek relief under Section 29(3) of the Constitution Amendment Act 1997.
10. The relief sought by the Plaintiff is not based on the termination of employment and therefore the court is not inclined to consider based on the termination in this matter and consider only the suspension from duties for determination.
11. Counsel for Defendants argues that pursuant to Section 23 B(1) of Administration of Decree No. 14 of 2010 this court lacks jurisdiction to hear and determine the issue of suspension from duties.
12. Therefore, for preliminary issue before the court for determination is that of jurisdiction under 23B(1) of Decree No. 14 of 2010.
13. Section 23B(1) of the Decree No. 14 of 2010 in headed "*certain decisions of this state not to be challenged*". Hence, the court has to make determination whether the decision of the Defendants to suspend the Plaintiff from duties is subject to challenge in court.
14. 23B(1) reads:

*"No court, tribunal, commission or any other adjudicating body shall have the jurisdictions to accept, hear, determine or in any other way entertain, any challenges at law, in equity or otherwise (including any application for*

*judicial review) by any person or body, or to entertain or grant any remedy to any persons or body, in relation to the validity, legality or propriety of any action, decision or order of the Government of the Republic of Fiji, any Minister, the Public Service Commission or any statutory authority or Government entity to:*

- (i) Restructure or reform any Government public office or public service, including corporatizing or privatizing any Government department, ministry, statutory authority or Government entity; or*
- (ii) Alter or amend the terms and conditions of employment of any person in any public office or public service, including any changes effected through directions issued by the Public Service Commission by any memorandum or circular or through any other directive issued by the Government of the Republic of Fiji, any Minister, the Public Service Commission or any statutory authority or Government entity; or*
- (iii) Any changes to terms of services including the remuneration of any person in public offices or public service, statutory authority or Government entity.”*

15. This court needs to carefully examine to ascertain whether the suspension from duties is sought by the said sections. Subsection (ii) states that any alteration or amendment of the terms and conditions of employment of any person by the Public Service Commission is not subject to challenge.

16. In the case of **The State v Public Service Commission and Ana Lagere [unreported]** [HBJ 06 of 2011] 18 November 2011, Calanchini J held:

*“The issue is whether the decision taken by the Respondent is caught by section 23B of the Decree or does the decision relate to a subsisting employment benefit under Section 23C.*

*The word subsisting when given its plain an ordinary meaning (in shorter oxford English dictionary) refers to an employment benefit that exists as a reality. The applicant has been suspended and a legal consequence of that time that the applicant applied for restoration of part of her pay, the decision taken by the Respondent did not relate to an employment benefit that existed as a reality. The decision did not relate to a subsisting employment benefit.*

*The applicant in my judgment quite indicated that there was no challenge to the decision to suspend the applicant. I say quite rightly because my judgment such a challenge can be caught by Section 23B. Any subsequent decision connected to the decision to suspend so as to be considered as part of the decision and also cannot be challenged.”*

17. In the case of **State v Permanent Secretary for Works and Transport and Public Utilities exparte Tubunaruarua [2012]** HBJ 2 of 2012, Wati J held:

- “i. The matter before me is not on the issue of suspension. It is on termination. Suspension does not bring a contract to an end. It only is a change in the term of service so it is clearly caught by the subsection.*
- ii. I am clearly of the view that the provision of S.23B does not preclude a person from bringing any proceeding in Court arising out of a decision by Public Service Commission to terminate any persons employment. The crafting of the two subsection (ii) and (iii) is an open and shut provision on decisions to change any terms and conditions of the contract albeit ex facie it opens a room for debate.”*

18. In view of the above authorities, I am inclined to accept the position advanced by the Defendants that the suspension is clearly caught by the subsection and that this court lacks jurisdiction to hear and determine the substantive issue

before the court by operation of the Administration of Justice Decree No. 14 of 2010.

19. The effect of the Section 23 B(1) is stipulated in Section 23B(2) of the Decree. Section 23B(2) reads:

*“(2) Any action proceeding, claim, dispute or grievance of any form whatsoever in any court, tribunal commission or any other person or body exercising a judicial function which purports to or purported to challenge any action, decision or order of the Government of the Republic of Fiji, any Minister, the Public Service Commission or any statutory authority or Government entity as it relates to actions, decisions, or orders as referred to in subsection (1) shall wholly terminate upon the commencement of this Decree and all orders whether preliminary or substantive made therein shall wholly terminate upon the commencement of this Decree, and a certificate to that effect shall be issued by the Chief Registrar, Tribunal, Commission or any other person or body exercising a judicial function.”*

20. In view of the provisions of the above section this matter is referred to Chief Registrar to take appropriate steps to issue a certification to terminate the proceedings.
21. No orders as to costs.

Susantha N Balapatabendi  
**JUDGE**