IN THE HIGH COURT
AT SUVA
CIVIL JURISDICTION

JUDICIAL REVIEW HBJ NO: 11 of 2014

IN THE MATTER of an application for leave to apply for Judicial Review by **SAVERIO BALEIKANACEA** (the Applicant)

AND

IN THE MATTER of the decision by the **PUBLIC SERVICE COMMISSION** (the Respondent) who purportedly made the Applicant redundant from the Public Service on the 24th day of April, 2014.

BETWEEN	:	**THE STATE**
AND	:	**THE SECRETARY PUBLIC SERVICE COMMISSION**
		Respondent
EX-PARTE	:	**SAVERIO BALEIKANACEA**
		Applicant
BEFORE	:	The Hon. Mr Justice David Alfred
Counsel	:	Mr. I V Tuberi for the Applicant Ms. S Taukei and Ms. T Sharma for the Respondent
Date of Hearing	:	22 May 2015
Date of Judgment	:	15 June 2015

JUDGMENT

1. The Application for leave to apply for Judicial Review and the Summons for leave to file the Application out of time both came up for hearing before me on 1 May 2015.

2. At the commencement of the hearing, Counsel for the Applicant made a preliminary submission that the requirement for leave of the court to be obtained before any application for Judicial Review shall be made is unconstitutional.

3. Accordingly, I heard his submission and those of Counsels for the Respondent and then reserved Judgment. On 22 May 2015, I delivered my Interlocutory Judgment dismissing the Applicant's preliminary submission/objection and reserved the issue of costs to be addressed at the final disposal of the Applications.

4. I then on the same day heard submissions by Counsel for the Applicant and Counsels for the Respondent on (A) the Summons for extension of time and (B) the Application for leave, in that order.

5. Applicant's Counsel's submission was as follows:

(i) The Summons for extension of time should only be heard at the substantive hearing.

(ii) Order 3 of the Rules of the High Court (RHC) which provides for extension of time can apply to applications for Judicial Review.

(iii) There were 3 requirements for the Application for leave, viz:

(1) The Applicant must have a sufficient interest.

(2) The matter is one of public law.

(3) There is an arguable case.

These are all set out in the leave Application:

(iv) That as the relevant provisions of the Public Service Act 1999 (Act) Public Service Regulations 1999 and the Employment Relations Promulgation 2007 (Promulgation) have not complied with, the transfer was therefore ultra vires as also was the decision of the Respondent to make the Applicant redundant.

(v) The Respondent never stated who would suffer hardship or prejudice or how the administration will be adversely affected.

Counsel in support of his submission, cited the cases of:

(a) State v Director of Town and Country Planning, Ex-parte Singh [1997] FJHC 208.

(b) In re: Application by Ovini Bokini [2008] FJHC 120.

[6] The first Counsel for the Respondent then submitted:

(i) Time started to run from 3 May 2014 which was the effective date stated in the Respondent's letter dated 24 April 2014 to the Applicant (the Decision).

(ii) The Application was only filed on 18 December 2014. This meant the Applicant was 4 months out of time.

(iii) The Applicant had sufficient time under Order 53 of the RHC to file his Application.

(iv) Delay can only be excused by the Court if there are merits to allow it.

(v) With regard to the Application for leave there was no arguable case.

(vi) The Applicant was made redundant because there was no position for him.

(vii) The Ministry acted intra vires.

(viii) The Promulgation was irrelevant because the Public Service is governed by the Act and not by the Promulgation. Also there was a contract between the Applicant and the Ministry.

[7] In his reply, Counsel for the Applicant said the Regulations have overtaken the contract and the Respondent has not shown where they have authority.

[8] At the conclusion of the hearing I reserved Judgment to a date to be fixed for its delivery, which as has been informed to Counsels, is today. I now proceed to do so.

A.

[9] The issue before me is really whether the Applicant is entitled to an extension of time to file his Application for leave. The crucial dates which are not in dispute and which are disclosed by the documents are the following:

1. The effective date of the redundancy of the Applicant was 3 May 2014

(see Annexure SB1 of the Applicant's Affidavit sworn on 16 December 2014).

2. The Application for leave to apply for Judicial Review was filed on 18 December 2014.
3. The Summons for Extension of Time to file 2 above was filed on the same day.
4. It was supported by the Affidavit of the Applicant sworn on 16 December 2014 (the Affidavit).

[10] At this juncture I need to consider what the Affidavit says:

(a) It avers the time for Judicial Review started to run from the 3rd of June 2014 and expired on the 2nd day of September 2014.

(b) It says that after approaching several lawyers, the Applicant was finally advised in October (2014) to see his present legal representative who advised him to provide him (Counsel) with certain documents. It took him several weeks to obtain the said documents.

(c) The delay in filing the Judicial Review is mainly due to the difficulties in finding the correct legal advice and in obtaining the documents.

[11] The contents of the Affidavit crystalize the issue. But does it entitle the Applicant to be given an extension of time to apply for Judicial Review?

[12] I will now turn to the Supreme Court Practice 1995 (the White Book). It lays down that an application for leave to move for judicial relief should be made promptly which means as soon as practicable or as soon as the circumstances of the case will allow.

[13] In any event such application must be made within three months from the date the grounds for the application arose. (In the instant case this would be 3 May 2015, the effective date of the redundancy).

[14] It is erroneously thought that such an applicant is always allowed three months to file his application and if he does so leave cannot be refused on the grounds of delay. This is not so.

[15] The primary requirement is that the application be made promptly. It is only a secondary provision that it be made within 3 months.

[16] The Court can extend time for applying for leave only if it considers there is good reason to do so.

[17] Returning to the Summons, the question is whether on the facts there is a reasonable excuse for the delay and whether there are good reasons for extending time.

[18] The cases concerning renewal of writs do not assist in the decision whether or not to grant an extension of time for applying for leave to move for judicial review because (a) Judicial Review proceedings are a matter of public law and (b), there is no true pending suit between parties.

[19] In the Court of Appeal of Fiji this question came up on Appeal in **Public Service Commission v Brian Singh & Public Service Appeals Board Civil Appeal No. ABU 0005 of 2007S**. The 3 Justices of Appeal unanimously ruled as follows:

1. Time runs from the date when notice of a decision was given to the Applicant.
2. It is desirable that the common law of Fiji be in accord with the common law of England and other commons law jurisdictions.
3. Order 53 rule 4 (1) of the RHC is disjunctive. The Court may refuse to grant either leave for Judicial Review or Judicial Review if the Court considers there has been undue delay or after the relevant period has expired; thus proceedings for leave must be issued without undue delay and in any event within the time limited by the RHC.
4. The Judge (of first instance) was correct in refusing leave where there was undue delay notwithstanding the application was filed on the last day of the three months.

[20] "In the **State v Chief Executive Officer for Health**... *First Respondent*, **Public Service Commission**.... *Second Respondent*, **Attorney General of Fiji**...*Third*

Respondent, Ex-Parte: **Kalisito Vuki Maisamoa**... *Applicant:* High Court at Suva Civil Action No: HBJ 34 of 2006, the Application was filed more than four months after the decision being impugned. The explanation proffered was the errors of the solicitors in making the application. Jiten Singh J held these errors *"can hardly be a good reason for grant of extension of time to apply for judicial review."*

[21] Here in the instant case although difficulty in obtaining documents was proffered as the excuse for the delay, I saw no evidence for this in the Affidavit of the Applicant in support of his Application for extension of time, sworn on 16 December 2014.

[22] The Annexures to the said Affidavit are respectively dated 24 April 2015 (the Respondent's letter to the Applicant), 2 May 2014 (letter from the Applicant to the Prime Minister) and 3 June 2014 (letter from the Respondent to the Applicant). These 3 letters were all well within the 3 months for filing any Application for Judicial Review.

[23] In arriving at my decision I have perused the authorities cited by Counsel for the Applicant but are unable to follow them. This is because I am bound to follow the decision of the Court of Appeal in Brian Singh's case above which is binding upon me.

[24] I am also unable to accept the explanation offered by the Applicant as a reasonable excuse for the delay.

[25] I therefore find and so hold that no good reason has been provided for me to grant an extension of time.

[26] In the circumstances, no matter what the Applicant contends should be the date when time begins to run i.e. 24 April 2014 or 3 May 2014 or 3 June 2014, time would have run out, well before the 18 December 2014 when he filed his Application seeking leave for Judicial Review.

[27] Accordingly, I hereby dismiss with costs the Summons filed on 18 December 2014, for leave to file the Judicial Review Application out of time.

[28] Nevertheless, in the event I may be wrong in my above decision, I will consider if there are grounds for the Applicant to be granted leave to move for judicial review of the Decision.

B.

[29] The Application for leave filed on 18 December 2014 set out the following grounds, a precis of which I append below:

1. The Respondent breached the rules of natural justice and was unreasonable in allowing the transfer of the Applicant from the Ministry of Local Government, Urban Development, Housing and Environment (Ministry) without giving any valid reasons at all.
2. The Respondent breached the rules of natural justice by transferring the Applicant from the Ministry giving him no posts in the Public Service and claiming he was redundant.
3. The Respondent acted ultra vires the provisions of the relevant Sections of the Employment Relations Promulgation 2007 (Promulgation) by failing to give the Applicant 30 days before carrying out the termination and by failing to give the Applicant or his representative an opportunity for consultation to avert or minimize the termination and by failing to show that the termination was due to the economic structural or technological nature of his post.

[30] The Respondent in his Notice of Opposition filed on 29 January 2015 stated his reasons for opposing the Application, a precis of which I append below:

1. Delay in filing the Application is prejudicial to the Respondent and detrimental to good administration.
2. The Applicant has not provided particulars or reasons for the delay in applying for leave for Judicial Review.
3. There is no arguable case.

[31] As this is an application for leave to move for judicial review, I state at the outset that the purpose of judicial review is not to substitute the judge's opinion for that of the authority constituted by law to decide the matters in question (see Chief Constable of **North Wales Police v Evans** [1982] 3 All E.R. 143 per Lord Hailsham L.C).

[32] Judicial Review has a two stage process:

(a) First is the application for leave to move for Judicial Review. Only if this is granted will the court proceed to stage two.

(b) Second is the substantive application for judicial review.

[33] With regard to (a) above:

(i) The applicant must have a sufficient interest in the application for judicial review.

(ii) He must apply for leave promptly and in any event not later than 3 months from the date of notice of the impugned decision.

(iii) Finally he must have an arguable point to be investigated in the substantive hearing.

[34] Only if he crosses the threshold successfully will he be entitled to receive a substantive hearing at stage 2.

[35] Then the court will consider the grounds on which judicial review may be granted. These are:

1. Want or excess of jurisdiction (ultra vires).
2. Where there is an error of law on the face of the record.
3. Failure to comply with the rules of natural justice (procedural irregularity).
4. Unreasonableness under the Wednesbury principle (illogicality).

[36] At this juncture we are only at stage 1. At this stage, I am only required to consider if the Applicant has shown prima facie an arguable case on the merits for the grounds of relief, fit to be considered in a substantive hearing.

[37] In other words I have to decide on their first appearance whether the grounds put forth are arguable on their merits and are not to be characterized as frivolous vexatious or hopeless.

[38] The above are laid down in the decision of the Fiji Court of Appeal No. 8 of 19990 (Judicial Review No. 11 of 1989) between: **The National Farmers Union**... *Appellant* and **Sugar Industry Tribunal**.... *First Respondent*, **The Fiji Sugar Corporation**... *Second Respondent*, **The Sugar Cane Growers Council**... *Third Respondent.*

[39] Returning to the instant Application there are really only 2 grounds *viz*:

1. The decision is ultra vires.
2. The rules of natural justice were not complied with.

[40] With regard to ground 1, I consider its fails immediately because the Decision was not ultra vires since the Promulgation does not apply to the Government. This is provided for in Section 2(2) of the Employment Relations (Amendment) Decree 2011 which states the "Promulgation does not apply to the Government, including the Public Service Commission,...."

[41] As for ground 2, this also falls as the Applicant has nowhere provided any evidence to show in what way the rules of natural justice were not complied with.

[42] On the contrary, he shown in Annexure SB1 (to his Affidavit sworn on 16 December 2014) which is a copy of his letter dated 2 May 2014, entitled. *"Re: Redundancy Package"*, to the Prime Minister, which letter enclosed a copy of the letter (the Decision) that the nub of his request is to be "offered the redundancy package in PSC Circular Memorandum of 15.10.1996".

[43] It is my finding and I so hold that the Applicant has failed to establish *"a case sufficiently arguable to merit investigation at a substantive hearing"* (The White

Book) and I therefore dismiss the Application for leave to apply for Judicial Review filed on 18 December 2014.

[44] With regard to the costs under the Interlocutory Judgment on 22 May 2015 and the Judgment today, I order the Applicant to pay the Respondent, costs which I summarily assess in the total sum of $1,000.00 for both.

Delivered at Suva this 15th day of June 2015.

David Alfred
JUDGE
High Court of Fiji