

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Judicial Review No.: HBJ 11 of 2015

IN THE MATTER of the **PUBLIC**
SERVICE DISCIPLINARY TRIBUNAL

AND

IN THE MATTER of an application by the
SOLICITOR GENERAL for a Judicial
Review and with other reliefs including an
Order of Certiorari to quash the decision
made by the Public Service Disciplinary
Tribunal (“the Tribunal) whereby the
Tribunal has, on 03/02/2015, ordered that
the submissions of the Applicant on time
limitation be dismissed and that the
Applicant file fresh amended disciplinary
charges within the time limitation imposed
by the Tribunal.

STATE **V** **PUBLIC SERVICE DISCIPLINARY TRIBUNAL**

EX-PARTE **:** **THE SOLICITOR GENERAL**

AND **:** **SALANIETA NAWAQAVOU**

RESPONDENT

APPLICANT

INTERESTED PARTY

Counsel **:** **Mr. N. Chand for the Applicant**

The Chairman of Respondent appeared for the Respondent

The Interested party appeared in person.

Date of Hearing **:** **23rd June 2015**

Date of Decision **:** **7th August 2015**

DECISION

INTRODUCTION

1. The Applicant filed the Application for Leave to Apply for Judicial Review, in terms of Order 53 rule 3(2) of the High Court Rules of 1988. The said application is relating to decision made by the Public Service Disciplinary Tribunal (PSDT) on 3rd February, 2015 where it ordered the Applicant to file fresh amended disciplinary charges against the Interested Party. The said decision was based on a PSDT Circular No 02/2014, which limited the time frame for charges relating to disciplinary action to one year. The said PSDT Circular was based on the limitation contained in the Criminal Procedure Decree, 2009. The Applicant states that charges against the Interested Party were not criminal charges, hence there is no requirement to limit charges for a time period of 12 months.

FACTS

2. The Interested Party was employed as a Secretary in the Office of Attorney General and was suspended from her employment pending the outcome of the disciplinary proceedings.
3. The charges relate to the Interested Party being absent several occasions, without prior leave from 15th May, **2006** to 22nd July, **2014**. It is alleged that Interested Party continuously took excessive leave despite being warned and counseled to improve her attendance.
4. On 23rd September, 2014 she was served with the disciplinary charges. The Interested Party replied to it on 10th October, 2014. The said charges and reply was forwarded to PSDT in terms of Sections 6 and 7 of the Public Service Act, 1999 in order to consider appropriate disciplinary action against the Interested Party.
5. PSDT Circular No 2 of 2014 states that it shall not accept any matter or charge laid 12 months after the matter or charge arose, in terms of Section 187(2) of the Criminal Procedure Decree, 2009.

6. The PSDT delivered ruling on 3rd February, 2015, ordered that the Applicant to file fresh amended disciplinary charges and confined all the charges to 12 month time period.
7. The Applicant seeks judicial review of the said ruling of the PSDT
8. The Interested Party has failed to file grounds of opposition as required but it was filed outside 2 day time period, but the Respondent has filed the grounds of opposition after stipulated time period.

ANALYSIS

The Preliminary Objection

9. The Applicant object to the late filing of the Notice of Opposition by the Respondent. Pursuant to Order 53 rule 3(2), Form 32 of the Appendix 1 of the High Court Rules 1988, as amended, it is required that Notice of Opposition and Grounds of Opposition be filed within 2 days of receipt of the application under Order 53 rule 1(3) of the High Court Rules 1988.
10. The Form 32 of the Appendix 1 of the High Court Rules,1988 which is referred to in Order 53 rule 3(2) of the High Court Rules , 1988 specifically mention that **“If you oppose this application detach and return bottom portion to the High Court registry within 2 days of receipt”**.
11. In the present Application the Attorney General who is the counsel for the statutory bodies that have executive function similar to PSDT (the Respondent) is the Applicant seeking Judicial Review of the decision made PSDT. So the Respondent could not obtain the legal services from the office of Solicitor General as done usually. This unique situation has created some difficulty for the Respondent. It had to obtain legal counsel from private bar and for that they needed some authority to do so.
12. I was told by the Chairman of the Respondent who appeared for the Respondent that, though they had sought approval to engage a private counsel, they were yet to receive

such approval. In the circumstances the delay can be justified. In any event they had filed the grounds of opposition, long before the hearing of this matter. When considering the circumstances, it would be unreasonable to reject the grounds of opposition filed by the Respondent only because it was not filing within 2 days of notice, which would have been impossible in the present circumstances. So the preliminary objection against the Respondent is overruled.

13. In the written submissions filed by the Applicant *State v President of Fiji et al* (2000)1 FLR 24 was cited as an authority to argue that the time period for filing statement of opposition was 7 days. But I cannot find such determination as the ratio of that case, though there was a suggestion that instead of 2 days 7 days would be more ‘profitable.’ This was stated considering the 2 day time period, and time needed for statutory bodies subjected to Judicial Review, to obtain legal representation.
14. In *State v President of Fiji et al* (supra) reiterated the need to deal with judicial review applications swiftly, nevertheless stated that the time period of 2 days for filing grounds of opposition can be extended by the court and the court did extend at the time. The said case was an urgent matter along with some other connected pending matters related to important constitutional issues. So, there was an additional reason for urgency in the determination of the said matter swiftly, but the court had allowed extension of time period and in *obiter* stated that 7 days would be much ‘profitable’. This statement cannot be used to construe that the time period for filing the grounds of objections is 7 days and that the period as a mandatory requirement. The ratio of the said case is time period of 2 days is not mandatory and it can be extended by the court. So applying the said ratio I accept Respondent’s Grounds of Opposition filed after expiry of 2 day time period.
15. Even though the Respondent had failed to file notice of opposition, within 2 days, as required by Form 32 of High Court Rules of 1988, it had done so before the hearing and there was no prejudice to the Applicant.
16. The court can grant leave for Judicial Review , even without hearing in terms of Order 32 rule 3(3)(ii). of High Court Rules of 1988 So a party who does not file grounds of

opposition within stipulated time may risk the leave for judicial review being granted after the expiry of 2 day time period as stipulated in Form 32 of the High Court Rules of 1988, in an appropriate matter.

17. The Application for Leave for Judicial Review was heard *inter partes* and the grounds of opposition was filed more than 3 weeks before the hearing. So, the request to reject such grounds of opposition and or to prevent appearance of Respondent in this hearing is against the spirit of *inter partes* hearing of this Application.
18. As I said previously, in this matter there was an additional impediment for the Respondent as state had filed this action and they could not obtain permission to retain a counsel from private bar in time to file such grounds of opposing. They had filed the grounds of opposition at least 3 weeks prior to the hearing and there was no prejudice to parties due to delay.
19. The Interested Party failed to file notice of opposition and there was no impediment to engage a legal counsel or seek legal advice from a competent person. So the preliminary objection as to their appearance is upheld. Without filing the grounds of opposition a party cannot oppose the leave, as it is an essential preliminary requirement in opposition of this Application.

Leave For Judicial Review

20. In Fiji Court of Appeal in ***Proline Boating Company Ltd v Director of Lands*** [2014] FJCA 159; ABU0020.2013 (decided on 25 September 2014) Goonaratna J said that in a determination of leave for a judicial review, the grounds were classified in terms ;

‘These criteria may be classified as follows:

- (a) *Mandatory Statutory Requirements.*
- (b) *Other requisites developed largely judicially given the fact that, as opposed to a direct appeal, judicial review is a remedy that is subject to the exercise of judicial discretion.’*

21. Mandatory Requirements are contained in the High Court Rules of 1988. These are found in Order 53 rule 3(2), (3), (4) and (5) of High Court Rules of 1988. Accordingly, an

application for leave should be filed in the High Court Registry, with a notice in Form 32 in the Appendix to the High Court Rules of 1988. The Applicant has complied with the said Form 32.

22. The application should also contain a statement of particulars of the order of which judicial review is sought, relief sought and grounds for such relief, name and description of the applicant and solicitors and applicants address for service.(see O. 53 r.3(2)(a)(i)-(v) of High Court Rules of 1988)The Applicant had complied with them.
23. Apart from what was stated above, an affidavit is also required verifying the facts which the Applicant relies. I cannot see any failure on the part of the Applicant regarding above mentioned requirements.(see O. 53 r.3(2)(b) of High Court Rules, 1988)
24. The Applicant was also, required to serve the copies of application for leave and the affidavit in support to all persons directly affected by the application. (See O.53 r3 (3)(i). High Court Rules, 1988) This is an important provision and service of **all persons directly affected** is an essential requirement, even though hearing of them is not mandatory before granting leave for judicial review. (See O.53 r3(3)(ii) High Court Rules, 1988). The requirement under said provision is twofold. One is to ascertain the parties who are directly affected by this application and for this attention should be directed to the orders sought in the summons. The second thing is to ascertain whether all such parties were served with the Application.
25. It is important to see whether there are any directly affected party not being named as a party to this application. The decision against which the judicial review is sought is PSDT and they were served and they appeared in court. The PSDT decision related to a charges filed by the Applicant against the Interested Party and she is already a party to this application and was served with the application seeking leave. There is an affidavit of service in support of the service. I cannot see any other person being directly affected not named in this application, thus the Applicant had fulfilled the mandatory requirement laid down in Order 53 rule 3(i) of High Court Rules of 1988.

26. The Order 53 rule 3(5) of the High Court of 1988, states as follows
- 'The court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates.'*
27. The Application relates to a decision taken by Respondent (PSDT) requesting the Applicant to amend the charge sheet of the Interested Party in terms of its Circular No 2 of 2014.
28. The Applicant is the employer of the Interested Party, and the disciplinary matter was referred to the Respondent after the service of disciplinary charges. The Respondent requested the Applicant to amend the said charges as the charges related to a time period more than 12 months. The time period for the charges were over 7 year period.
29. In **R v Secretary of State for Foreign Affairs, ex parte World Development Movement Ltd** [1995] 1 All ER 611 at 620 after discussing the law relating to identical provision in UK, held,
- 'For my part, I accept that standing (albeit decided in the exercise of the court's discretion, as Donaldson MR said) goes to jurisdiction, as Woolf LJ said. But I find nothing in IRC v National Federation of Self-Employed and Small Businesses Ltd to deny standing to these applicants. The authorities referred to seem to me to indicate an increasingly liberal approach to standing on the part of the courts during the last 12 years. It is also clear from IRC v National Federation of Self-Employed and Small Businesses Ltd that standing should not be treated as a preliminary issue, but must be taken in the legal and factual context of the whole case (see [1981] 2 All ER 93 at 96, 110, 113, [1982] AC 617 at 630, 649, 653 per Lord Wilberforce, Lord Fraser and Lord Scarman).*
- Furthermore, the merits of the challenge are an important, if not dominant, factor when considering standing. In Professor Sir William Wade's words in Administrative Law (7th edn, 1994) p 712: '... the real question is whether the applicant can show some substantial default or abuse, and not whether his personal rights or interests are involved.'*
- Leaving merits aside for a moment, there seem to me to be a number of factors of significance in the present case: the importance of vindicating the rule of law, as Lord Diplock emphasised in IRC v National Federation of Self-Employed and Small Businesses Ltd [1981] 2 All ER 93 at 107,*

[1982] AC 617 at 644; the importance of the issue raised, as in Ex p Child Poverty Action Group; the likely absence of any other responsible challenger, as in Ex p Child Poverty Action Group and Ex p Greenpeace Ltd; the nature of the breach of duty against which relief is sought (see IRC v National Federation of Self-Employed and Small Businesses Ltd [1981] 2 All ER 93 at 96, [1982] AC 617 at 630 per Lord Wilberforce); and the prominent role of these applicants in giving advice, guidance and assistance with regard to aid (see Ex p Child Poverty Action Group [1989] 1 All ER 1047 at 1048, [1990] 2 QB 540 at 546). All, in my judgment, point, in the present case, to the conclusion that the applicants here do have a sufficient interest in the matter to which the application relates within s 31(3) of the 1981 Act and Ord 53, r 3(7).

It seems pertinent to add this, that if the Divisional Court in Ex p Rees-Mogg eight years after Ex p Argyll Group was able to accept that the applicant in that case had standing in the light of his 'sincere concern for constitutional issues', a fortiori, it seems to me that the present applicants, with their national and international expertise and interest in promoting and protecting aid to underdeveloped nations, should have standing in the present application'

30. As stated in the above decision, the issue of 'sufficient interest' is more than a mandatory requirement in terms of Order 53 rule 3(5) of High Court Rules of 1988 and it deals with the jurisdiction of the court in judicial review. The attitude of the courts in UK is to give liberal interpretation of said provision that would embrace a wider interpretation thus, a wider jurisdiction. These decisions were applied in Fiji Court of Appeal.
31. ***R v Monopolies and Mergers Commission, ex p Argyll Group plc*** [1986] 2 All ER 257, [1986] 1 WLR 763. Donaldson MR, when referring to the provision of Ord 53, r 3(7), which is analogous to High Court Rules 1988 of Fiji, said ([1986] 2 All ER 257 at 265, [1986] 1 WLR 763 at 773):

'The first stage test, which is applied on the application for leave, will lead to a refusal if the applicant has no interest whatsoever and is, in truth, no more than a meddling busybody. If, however, the application appears to be otherwise arguable and there is no other discretionary bar, such as dilatoriness on the part of the applicant, the applicant may expect to get leave to apply, leaving the test of interest or standing to be re-applied as a matter of discretion on the hearing of the substantive application. At this second stage, the strength of the applicant's interest is one of the factors to be weighed in the balance.'

32. The said case was applied in Fiji Court of Appeal in **Proline Boating Company Ltd v Director of Lands** [2014] FJCA 159; ABU0020.2013 (decided on 25 September 2014) and in UK in **R v Secretary of State for Foreign Affairs, ex parte World Development Movement Ltd** [1995] 1 All ER 611 at 618-619.
33. In the circumstances the interest of the Applicant in this case falls within the scope of Order 53 rule 3(5) High Court Rules, 1988 as an employer of the Interested Party, who drafted the said disciplinary charges. Apart from this, even considering the importance of the interpretation of the PSDT Circular and its wider application to public sector at large and more particularly to disciplinary actions against public servants, and also relevant provision of the Fiji Constitution, the Applicant has 'sufficient interest' in this Judicial Review.
34. If the charges were to be amended as requested by the Respondent in terms of said PSDT Circular that would drastically reduce the number of disciplinary charges against the Defendant and this creates sufficient interest for the Applicant as an employer to seek interpretation of relevant laws in order to maintain all the charges against the Interested Party before PSDT. The charges against the Interested Party confined to a period more than 7 years.
35. Fiji Court of Appeal in **Proline Boating Company Ltd v Director of Lands** [2014] FJCA 159; ABU0020.2013 (decided on 25 September 2014) Goonarana J held,

'Other Requisites to be looked into at the Leave Stage

[41] *I now move onto deal with the other requisites which ought to be looked into at the stage of seeking leave to apply for judicial review.*

[42] *This is necessary in order "to eliminate frivolous vexatious or hopeless applications" that would prima facie appear to be so. (vide: **Harikissun Ltd v. Dip Singh & Ors.** [FCA Rep. 96/365].*

[43] *These requisites in developed jurisdictions may be noted as follows:*

(1) Was there an inordinate delay in seeking Judicial review against the decisions that is complained of by an applicant?

(2) Does that decision/emanate from the exercise of statutory power by a public body even if disputes involving private parties are involved?

(3) What reliefs have been sought by an applicant in his/her application for leave to apply for Judicial Review and against whom?’

Inordinate delay

36. There is no delay in this application as the Applicant has filed this Application on 1st May, 2015 against the decision of the Respondent pronounced on 3rd February, 2015. I do not wish to say more on this matter.(see *Proline Boating Company Ltd v Director of Lands* [2014] FJCA 159; ABU0020.2013 (decided on 25 September 2014))

Does that decision/emanate from the exercise of statutory power by a public body even if disputes involving private parties are involved?

37. It is abundantly clear that the impugned decision that is the subject of this Application for judicial review was made by a public body. The PSDT is created by the Constitution of the Republic of Fiji in terms of Section 120(1) and also by relevant statute in terms of Section 120(8) of the Constitution of the Republic of Fiji. So the decision made on 3rd February, 2015 is an exercise of statutory power by public body.

What reliefs have been sought by an applicant in his/her application for leave to apply for Judicial Review and against whom?’

38. The Judicial Review is sought against PSDT, the Respondent. The relief relate to the interpretation of the PSDT Circular 2 of 2014, issued by the Respondent and its application. The contention of the Applicant is that since the said Circular is based on the Criminal Procedure Decree, 2009 it cannot be applied to the disciplinary charges against the Interested Party. The Respondent in affidavit in opposition at paragraph 18 admitted that the Circular was made on the ‘principle’ of Section 187(2) of the Criminal Procedure Decree, 2009. So whether this should apply to civil wrongs or breaches creates an arguable case at this stage.

39. It is admitted that all the disciplinary charges against the Interested Party were not relating to any criminal act and based on breaches of 'Code of Conduct'. (see paragraph 18 of the affidavit in opposition of the Respondent)
40. In any employment there can be civil disciplinary breaches for which charges may be leveled against an employee. For example, excessive absenteeism, absent without approval and or notice, civil insubordination, failure to follow code of conduct, etc may result disciplinary actions. The relief sought by the Applicant, though directed as particular decision, its application would be much wider, to public sector and the application of Code of Conduct.
41. Finally, I deal with the issue of alternate remedy. The Respondent conceded that there is no appellate body in operation at the moment. The Fiji Constitution states that any decision of Respondent can be reviewed by the High Court. (see Section 120(10) of Constitution of the Republic of Fiji). So, I do not think that I need to labour more on this issue.
42. Though the summons sought a stay of proceedings by Respondent this was not dealt in the hearing. So I do not deal that matter. Since the Respondent is not proceeding with inquiry, without an amended charge sheet there may not be a requirement for such a stay.

CONCLUSION

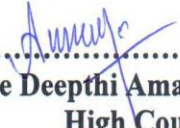
42. The Applicant has complied with the requirements contained in the High Court Rules of 1988 regarding the preliminary requirements relating to this application. The Applicant has demonstrated that there is sufficient interest in making this application. There is an arguable case established, which is the threshold for the grant of leave for Judicial Review. In the circumstances I grant the leave to the Applicant for judicial review. I do not award costs considering the circumstances of the case.

FINAL ORDERS

- a. The Leave is granted to the Applicant to apply for Judicial Review of decision of the PSDT dated 3rd February, 2015.
- b. No costs.

Dated at **Suva** this 7th day of **August, 2015**.




.....
Justice Deepthi Amaratunga
High Court, Suva