

In the High Court of Fiji at Suva

Civil Jurisdiction

HBJ No 7 of 2014

The State

And

Permanent Secretary for Social Welfare, Women

And Poverty Alleviation

Respondent

Ex parte: Taraivosa Seniu

Applicant

Appearances: Mr K. Maisamoa for the applicant

Ms L.Bali with Ms T. Sharma for the respondent

Date of hearing: 26th March,2015

Judgment

1. The applicant seeks leave to apply for judicial review of a decision terminating his employment as Senior Administrative Officer in the Ministry for Social Welfare, Women and Poverty Alleviation. The applicant seeks an order of certiorari to quash that decision and an order of mandamus requiring the respondent to reinstate him.
2. The application is premised on the grounds that the respondent: breached the rules of natural justice when he acted as prosecutor, judge and executioner in the disciplinary proceedings against him; acted ultra vires and ignored the disciplinary process of the Public Service Regulation,1999, and section 15(2) of the Constitution of Fiji of 2013; failed to conduct any investigation on the allegations against him; was biased and unreasonable in not giving him an opportunity to be heard and providing him with counselling.

3. In his affidavit in support the applicant states:
 - a) He was appointed as teacher technical at the Grade ED8G in the Ministry of Education on 24th January, 2014, after signing a “*Contract of Service*” for appointment at Ballantine Memorial School.
 - b) By letter of 28th December, 2012, he was informed of his transfer to the Ministry of Social Welfare, Women and Poverty Alleviation.
 - c) By a memorandum of 18th April, 2014, he was asked to provide an explanation of his unprofessional attitude to fellow colleagues.
 - d) The memorandum alleged that he was unruly to one Mere Tora on 3rd April, 2014, when she was making a presentation to the Divisional Heads Meeting at the National Planning Office, Ministry of Finance Complex.
 - e) His comments were “*aimed at what Mr Rupeni Fatiaki’s comments about negative attitude in the e-mail*”. His reply was in regard to the concern of the staff on the low quality of the staff uniform and its high cost.
 - f) The allegations were “*so biased and could not specify them and the allegations should have been put in proper charges*”, as required by section 6 of the Public Service Act, 1999. This is procedural impropriety and a breach of the rules of natural justice.
 - g) On 8th April, 2014, he sent his response to the respondent stating the need to follow correct and proper procedures in making allegations against him.
 - h) By a memorandum of 16th April, 2014, the respondent terminated his employment as Senior Administrative Officer in Corporate Services from the Ministry of Social Welfare, Women and Poverty Alleviations. The memorandum contained “*some unproved allegations*” as reasons for his termination.
 - i) On receiving that memorandum, he responded on the same day, on 23rd April, 2014, and “*demande*d” to know the grounds and evidence to support his dismissal.
 - j) The respondent was unreasonable when he dealt with his case in a very short time.
4. The respondent, in his notice of opposition, states that the decision sought to be reviewed is not amenable to judicial review, as the applicant was employed under a contract. His contract expressly provided that such appointments can be terminated at any time by the employer, either by giving one month’s notice or payment of one month’s salary in lieu of notice. The

respondent terminated the applicant's employment under section 127(7) of the Constitution. Disciplinary charges do not have to be invoked for a contractual employment to be terminated.

5. The applicant, in his affidavit in reply states that the respondent has acted in breach of the rules of natural justice and contrary to section 127 (7) of the Constitution of Fiji of 2013, Regulation 16 of the Public Service Disciplinary Regulations, 2009, section 6 of the Public Service Act, 1999, on Breach of Code of Conduct and Regulation 22 (2) of the Public Service Regulation 1999.

6. *The determination*

- a. The applicant's application for leave to apply for judicial review of the decision terminating his employment is opposed by the respondent.
- b. The respondent states that the termination is not amenable to judicial review for the following reasons.
- c. Firstly, the applicant was employed under a contract.
- d. Secondly, the applicant's employment was an ordinary master and servant contract. It was terminated under the terms and conditions of his contract of employment, not under any statute nor in the exercise of a statutory functions. The availability of the remedy of judicial review hinges on whether the decision under review was made pursuant to an exercise of a statutory function, not for the reason that the decision-maker is a public authority.
- e. Thirdly, the termination of his employment is a private contract matter. It does not enter into the realm of public law. The appropriate remedy was in private law.
- f. I turn to the applicant's Contract of Service, as attached to his affidavit. This provides as follows.

Clause 3 of the Contract:

This Contract shall be for Three (3) years with effect from 23/01/2012 to 22/01/2015 ..

Clause 11 : *Conditions under which the Government may determine to terminate the Contract*
Without prejudice to the provisions of paragraph 13 (relating to dismissal):

- a) by giving the officer not less than one (1) month's notice, in writing of the date upon which the Contract will be terminated.*
- b) at any time by giving in lieu of the notice aforesaid, one (1) month's notice basic salary;*

Clause 13 : *Dismissal for Misconduct or Breach of any term of the Contract*

The Officer may be summarily dismissed under this Contract if after reasonable inquiries the appropriate Service Commission is satisfied that the Officer is guilty of misconduct or a breach under this Contract. Upon such dismissal, all rights and privileges accrued to him/her under this contract shall be forfeited with the exception of the rights and privileges established under GO 703.

- g.* In my view, clearly, the applicant's employment was contractual. I agree with the submission of Ms Bali, counsel for the respondent that he was employed under a contract. His contract of employment provided that his appointment could be terminated at any time by giving one month's notice or payment of one months' salary in lieu of notice.
- h.* Ms Bali has cited several cases in support of this well established principle of public law.
- i.* In *State v Ministry of Education & Attorney General ex parte Ravindra Singh*, (JR No. 42 of 2006) the applicant was appointed as a temporary teacher (secondary) with the Ministry of Education. His letter of appointment set out the terms and conditions of his contract. Paragraph 4 provided that he will be subject to section 140 of Constitution, the Public Service Act 1999, the Public Service (General) Regulations 1999 and various other regulations and provisions. The applicant's services were terminated, in the aftermath of several concerns and allegation as to his conduct, of which he was found guilty.

- j. It was held that the importation of the Constitution and other laws does not convert the contract “*from one which exists in the private domain into one which is justifiable by way of judicial review. The contract remains a private one. All that has happened is that it states for the purposes of the contract the various acts and regulations which normally apply to established civil servants are imported into this contract*”. In refusing leave to apply for judicial review, the Court stated :

This is a private contract and does not enter into the realms of public law. These are judicial review proceedings and as such should not have been utilized by the Applicant to bring before the Court any grievance which he felt arose from the termination of his contract.

- k. In *R v East Berkshire Health Authority ex parte Walsh*, (1984) 3 All ER 425 as also cited by Ms Bali, the applicant was employed as a Senior Nursing Officer under a contract of employment which incorporated the terms and conditions that were negotiated by a recognized negotiating body and approved by the Secretary of State for Social Services. The applicant’s employment was terminated by the District Nursing Officer. The applicant sought judicial review on the grounds that the dismissal was ultra vires and in breach of natural justice. Sir John Donaldson M. R. held that the matter that did not raise an issue of public law and stated:

Alternatively it can require the authority to contract with its employees on specified terms with a view to the employee acquiring ‘private law’ rights under the terms of the contract of employment. If the authority fails or refuses to thus create “private law” rights for the employee, the employee will have “public law” rights to compel compliance, the remedy being mandamus requiring the authority so to contract or a declaration that the employee has those rights. If, however, the authority gives the employee the required contractual protection, a breach of that contract is not a matter of “public law” and gives rise to no administrative law remedies.

- l. The passages I have cited was referred to in *Permanent Secretary of Education & Attorney General v Savita Devi Nair*, (Civil Appeal No.ABU0061 of 2008) . In that case, Savita Devi Nair sought judicial review of a decision to transfer her from her post as Vice Principal from one school to Vice Principal of another .

- m. Marshall JA applying the principles discussed in *East Berkshire Health Authority ex parte Walsh*, and *Tucker v Director General*, [2003] 1 CR 599 held that there was no public law element and the decision to transfer was not amenable to supervisory jurisdiction by way of judicial review.
- n. Returning to the present case, in my judgment, the applicant has not shown an arguable case for the grant of leave.
- o. The FCA in *National Farmers Union v Sugar Industry Tribunal and Others* (ABU 8 of 1990) said:

We accept that at the leave stage of an application for judicial review the Court is not required to do more than decide whether the applicant (leaving aside the questions of locus standi and delay which are not in issue here) has shown prima facie an arguable case on the merits on each ground for relief.

A ready test for deciding (whether grounds were on their face arguable on the merits and fit to be considered in the substantive hearing) is whether any particular ground could properly and reasonably be characterized as frivolous, vexatious or hopeless in the sense of being patently devoid of merit.

- p. The application for leave fails.

7. Orders

- (a) The application for leave to apply for judicial review is declined.
- (b) The applicant shall pay the respondent costs summarily assessed in a sum of \$ 1000.

27th January, 2016



A.L.B. Brito-Mutunayagam

A.L.B. Brito-Mutunayagam

Judge