

IN THE HIGH COURT OF FIJI

AT LAUTOKA

CONSOLIDATED JUDICIAL REVIEW NOS. HBJ 8 AND 9 OF 2015

IN THE MATTER of CIVIL AVIATION
AUTHORITY OF FIJI

AND

IN THE MATTER of an application by TIMOTHY JOHN JOYCE, SUNFLOWER AVIATION LIMITED, JOYCE AVIATION (FIJI) LIMITED t/a HELI TOURS FIJI, JOYCE AVIATION (FIJI) LIMITED, TALL PINES LIMITED t/a PACIFIC FLYING SCHOOL, TANDEM SKYDIVE (FIJI) LIMITED and CAPTAIN LEPANI NALOMA for a Judicial Review and with other reliefs including an Order of Certiorari to quash the decision made by the Controller of Air Safety dated 30th July 2015 suspending TIMOTHY JOHN JOYCE with immediate effect for a period of 5 years his fit and proper status for all nominated post holder positions for the Joyce Aviation (Fiji) Limited group of aviation companies, namely Sunflower Aviation Limited, Pacific Flying School, Heli Tours (Fiji) Limited and Tandem Skydive (Fiji) Limited, and suspending CAPTAIN LEPANI NALOMA from any public transport line operation activities for Joyce Aviation (Fiji) Limited group of

aviation companies, namely Sunflower Aviation Limited and Tandem Skydive for a period of 12 months from 25th June 2015 and part of the decision made by the Chief Executive Officer dated 22nd October 2015 on an appeal pursuant to section 12F of the Civil Aviation Authority of Fiji Act 1979 directing Controller of Air Safety to put proper charges with full particulars to the Applicants within 21 days afresh together with documentary evidence against the Applicants and to reconsider the decision after the Applicants have been provided [with] an opportunity to respond.

STATE v

THE CONTROLLER OF AIR SAFETY of the Civil Aviation Authority of Fiji of CAAF Compound, Nadi Airport, Nadi.

FIRST RESPONDENT

CHIEF EXECUTIVE OFFICER of the Civil Aviation Authority of Fiji, of CAAF Compound, Nadi Airport, Nadi.

SECOND RESPONDENT

CIVIL AVIATION AUTHORITY OF FIJI situated at CAAF Compound, Nadi Airport, Nadi.

THIRD RESPONDENT

EX-PARTE

TIMOTHY JOHN JOYCE Lot 28, Sovereign Quays, Denarau Island, and Sunflower Hanger, Nadi, Fiji, Businessman, SUNFLOWER AVIATION LIMITED, JOYCE AVIATION (FIJI) LIMITED t/a HELI TOURS FIJI, JOYCE AVIATION (FIJI) LIMITED, TALL PINES LIMITED t/a PACIFIC FLYING SCHOOL, TANDEM SKYDIVE (FIJI) LIMITED all limited liability companies having their registered office at HLB Crosby & Associates, HLB House, 3 Cruickshank Road, Nadi Airport and CAPTAIN LEPANI NALOMA of Pacific Flying School, Nadi Airport, Pilot and Flying Instructor.

APPLICANTS

Appearances : Mr A. K. Narayan for the applicants
Mr R. Singh with Ms A.B. Swamy for the respondents

Date of Submission : 2 March 2017 (applicants' submission), 20 April 2017
(Second & third respondents' submission) and 11 July 2017
(applicants' submission in reply)

Date of Oral Hearing : 19 January 2018

Date of Decision : 09 April 2018

DECISION

Introduction

[01] This decision concerns a consolidated judicial review application. By consent of the parties, two judicial review applications (Nos. HBJ 8 and HBJ 9 OF 2015) were consolidated (*JRA*). On 21 March 2016, I granted leave to apply for JR pursuant to Order 53, Rule 3 of the High Court Rules 1988, as amended (*HCR*). The JR applications seek to judicially review the decision of the Chief Executive

Officer (CEO), the second respondent dated 22 October 2015 where he, in the exercise of his powers under section 12F of the Civil Aviation Authority of Fiji Act, 1979, decided an appeal from a decision of the Controller, the first respondent and directed as follows:

“

- a. *That the matter is to be referred back to the Controller for proper charges with full particulars of each breach alleged to have been committed to be put to Tim Joyce within 21 days from the date hereof, afresh.*
- b. *That the charges with the particulars are to be forwarded to Tim Joyce together with all documentary evidence that the Controller proposes to utilise against the said Tim Joyce.*
- c. *That the charges are to be reconsidered by the Controller after Tim Joyce has been provided [with] an opportunity to respond to the allegation against him.*
- d. *That in the meantime all the suspensions against Tim Joyce in relation to this appeal be uplifted and all adverse notations against him arising from this particular case to be revoked.”*

[02] By their applications dated 30 October 2015 and 21 March 2016, the applicants seek the following orders:

- (a) *AN ORDER OF CERTIORARI to remove and quash the decision of the Controller of Air Safety made on behalf of the Civil Aviation Authority of Fiji dated 30th July 2015 suspending TIMOTHY JOHN JOYCE with immediate effect for a period of 5 years his fit and proper status for all nominated post holder positions for the Joyce Aviation (Fiji) Limited group of aviation companies, namely Sunflower Aviation Limited, Pacific Flying School, Heli Tours (Fiji) Limited and Tandem Skydive (Fiji) Limited and suspending CAPTAIN LEPANI NALOMA from any public transport line operation activities for Joyce Aviation (Fiji) Limited group of aviation companies, namely Sunflower Aviation Limited and Tandem Skydive for a period of 12 months from 25th June 2015;*
- (b) *AN ORDER OF CERTIORARI to remove and quash part of the decision made by the Chief Executive Officer on behalf of the Civil Aviation Authority of Fiji dated 22nd October 2015 on an appeal pursuant to Section 12F of the Civil Aviation Authority of Fiji Act 1979 directing the Controller of Air Safety to put proper charges with full particulars to TIMOTHY JOHN JOYCE and CAPTAIN LEPANI NALOMA the named Applicants within 21 days afresh together with documentary evidence against the named Applicants and to*

reconsider the decision after the named Applicants have been provided an opportunity to respond;

- (c) *AN ORDER OF MANDAMUS directing the Second Respondent to withdraw the directives for the First Respondent to put proper charges with full particulars to TIMOTHY JOHN JOYCE and CAPTAIN LEPANI NALOMA the named Applicants within 21 days afresh together with documentary evidence against the named Applicants and to reconsider the decision after the named Applicants have been provided an opportunity to respond;*
- (d) *AN ORDER OF PROHIBITION prohibiting the Controller of Air Safety implementing or continuing to implement or otherwise giving effect to part of the decision of the Chief Executive Officer contained in the letter of 22nd October 2015 wherein the Chief Executive Officer has directed the Controller of Air Safety to put proper charges with full particulars to TIMOTHY JOHN JOYCE and CAPTAIN LEPANI NALOMA the named Applicants within 21 days afresh together with documentary evidence against the name Applicants and to reconsider the decision after the named Applicants have been provided an opportunity to respond;*
- (e) *FURTHER OR IN THE ALTERNATIVE, A DECLARATION (in any event) that the decisions of the Controller of Air Safety made on 30th July 2015 and the Chief Executive Officer made on 22nd October 2015 on behalf of the Civil Aviation Authority of Fiji has infringed TIMOTHY JOHN JOYCE and CAPTAIN LEPANI NALOMA the named Applicants rights to natural justice, fairness, breach of the named Applicants Constitutional rights and Section 12F is unconstitutional and the decisions are unfair, irrational arbitrary and unreasonable.*
- (f) *Damages.*
- (g) *Costs on a full Solicitor/Client indemnity basis.*
- (h) *ANY FURTHER DECLARATIONS or other relief as this Honorable Court may see fit.*

[03] The grounds upon which the applicants seek relief are as follows:

- a) *“The first respondent acted in breach of the principles of natural justice and fairness.*
- b) *The first respondent had failed to make a disclosure of information with respect to the matters under consideration and details of the evidence on the issues raised by the First Respondent in order to accord a proper hearing to the 1st named Applicant.*

- c) *The First Respondent failed to properly and/or adequately consult and/or properly hear the 1st named Applicant who had a legitimate expectation to be consulted and heard.*
- d) *The decision by the First Respondent suspending the 1st named Applicant with immediate effect the fit and proper status for all nominated post holder positions for the Joyce Aviation (Fiji) Limited group of aviation companies namely Sunflower Aviation Limited, Pacific Flying School, Heli Tours(Fiji) Limited and Tandem Skydive (Fiji) Limited is unreasonable and irrational and/or capricious.*
- e) *The First and Second Respondent's decision was in breach of the Constitutional rights of the Applicants and was arbitrary and improperly made.*
- f) *The Second Respondent's decision directing the First Respondent to put proper charges with full particulars to the 1st named Applicant within 21 days afresh together with documentary evidence against the 1st named Applicant and to reconsider the decision after the 1st named Applicant has been provided an opportunity to respond was unreasonable, irrational and in breach of the rules of natural justice, and also contrary to the principles of double jeopardy.*
- g) *The Second Respondents decision directing the controller of Air Safety to put proper charges with full particulars to the 1st named Applicant within 21 days afresh together with documentary evidence against the Applicant and to reconsider the decision after the 1st named Applicant has been provided [with] an opportunity to respond was ultra vires his powers.*
- h) *The First Respondents directive as to the procedures for the appeal to being limited to merits only and precluding the 1st named Applicant from placing any evidence which was not before the 1st named Applicant was unreasonable, unfair, arbitrary, in breach of natural justice and/or was ultra vires his powers under section 12F.*
- i) *The Second Respondents decision in directing the Controller of Air Safety to put control charges with full particulars to the 1st named Applicant within 21 days afresh together with documentary evidence against the 1st named Applicant and to reconsider the decision after the 1st named Applicant has been provided an opportunity to respond was ultra vires when the First Respondent had withdrawn the charges on the appeal.*
- j) *The First and Second Respondent failed to consider relevant factors and took into account irrelevant factors pertinent to the issues.*
- k) *The Second Respondents decision is biased and not made independently and/or after an independent enquiry and was influenced by the investigations and/or intervention of the First Respondent.*
- l) *Section 12F of the Civil Aviation Authority of Fiji Act 1979 in providing an appeal to the Second Respondent is unconstitutional being in breach of section 16(1)(c) of the Constitutional of Fiji."*

[04] The applicants rely on the Affidavits of Timothy John Joyce and Captain Lepani Naloma sworn on 28 and 29 October 2015 in support of the applications for Judicial Review.

[05] The second and the third respondents filed a notice of opposition on 19 November 2015. Their grounds for opposing the judicial review of the decision of the second respondent made on 22 October 2015 (*'the decision'*) include:

“

- a. *All the grounds for Leave for Judicial Review and Judicial Review pleaded in the Notice of Motion seeking leave of this Honourable Court for Judicial Review are denied by the Respondents.*
- b. *The Respondents have at all material times acted reasonably, rationally and have observed and abided by the principles of natural justice when it dealt with the Appeal lodged by the Applicant pursuant to Section 12 F of the Civil Aviation Act of Fiji 1979.*
- c. *The decision made by the Second Respondent is reasonable, fair, rational and in compliance with the principles of Natural Justice.*
- d. *The Applicant was given a proper and reasonable opportunity to respond and did respond prior to making of the decision and the Respondents took the response made by the Applicants into account when it made the decision.*
- e. *The Respondents did not in any manner whatsoever infringe any Constitutional Rights of the Applicant.*
- f. *Adequate reason[s] for the decision was given to the Applicants in a timely manner.*
- g. *The Applicant was given a right to present its Appeal through a solicitor which it did.*
- h. *The Applicant's Appeal was treated with fairness and no extrinsic, or irrelevant matters were considered by the Respondents when it made the decision.*
- i. *The decision is not caught by or is contrary to the principles of double jeopardy.*
- j. *The Second Respondent **did not** act arbitrarily, unfairly, in breach of natural justice, unreasonable or outside his powers or outside what is permitted under Section 12 F of the Civil Aviation Act of Fiji 1979.*
- k. *Not the entire charges laid against the Applicant by the Controller of Air Safety was withdrawn at the Appeal stage or when the Second Respondent considered the Appeal filed by the Applicant.*
- l. *The Second Respondent's decision is not bias and is independent and was made in good faith.*

- m. *The Second Respondent was not influenced by any other factor or persons and the decision was made independently and the Second Respondent at all material times acted independently.*
- n. *Section 12 F of the Civil Aviation Act of Fiji 1979 is not in breach of Section 16 (1)(c) of the Constitution of Fiji.” [Emphasis added]*

[06] The second and the third respondents rely on the affidavits of Netava Waqa (CEO) sworn on 12 November 2015, 4 December 2015 and 26 August 2016 for opposing the application.

[07] At the hearing, both parties made oral submissions and tendered their skeleton submissions. I am grateful to both counsel and their team for the quality of submissions they made by way of both oral and written submissions. I was immensely assisted by their submissions.

Background

[08] Timothy John Joyce (*First Applicant*) is the Chief Pilot, Chief Executive Officer, Director and shareholder of SUNFLOWER AVIATION LIMITED, JOYCE AVIATION (FIJI) LIMITED t/a HELI TOURS FIJI, JOYCE AVIATION (FIJI) LIMITED, TALL PINES LIMITED t/a PACIFIC FLYING SCHOOL, TANDEM SKYDIVE (FIJI) LIMITED, the second to fifth applicants (*the Companies*). The first applicant is fully involved in all operation of the Companies and he handles all their daily affairs and activities that they were involved in.

[09] Captain Lepani Naloma, the sixth named applicant (the Applicant in JR 9 of 2015 hereafter referred to as the *second Applicant*) is a Chief Pilot with the Companies.

[10] On 25 June 2015, the second applicant piloted a flight to Nanuku in a Beechcraft Duchess aircraft with three passengers. The aircraft was alleged to have run off the side of the run way (*the incident*). The first respondent wrote to the second applicant on 25 June 2015, advising of a report he had received of the incident and pending investigations by the Civil Aviation Authority of Fiji (CAAF), the third respondent his pilot’s license was suspended.

[11] By a letter dated 17 July 2015, the first respondent advised the first applicant of the completion of investigations and suspension of first applicant’s position as a

fit and proper person status with the Companies alleging 47 breaches of the Fiji Air Navigation Regulations (ANR). The letter also called on the first applicant to make representations as to why his said status should not be revoked.

- [12] Both the first and the second applicants made representations to the first respondent. Neither had been provided with the reports that the first respondent had compiled which had matters that were adverse at least against the First applicant. On 17 July 2015, the first respondent advised the first applicant that upon completion of investigations the applicants status as a fit and proper person for the Companies has been revoked with immediate effect for a period of 5 years. The first applicant was also advised of the right of appeal and provided with a circular entitled "*Function No. 1/2012.*"
- [13] The second applicant was advised by a letter from the first respondent on 30 July 2015, that his pilot's license has been suspended for 12 months with immediate effect. He was similarly advised of a right of appeal and provided with a copy of the circular entitled "*Function No. 1/2012.*"
- [14] Thereafter, the first applicant met the second respondent and sought distance disclosure of documents and particulars of charges. This was repeated by their solicitors.
- [15] The second respondent caused a disclosure to be made of a document entitled disclosure and no particulars of the charges were in fact provided. Instead, the first respondent on appeal advised that he was withdrawing the charges against the first applicant and proceeding with one revised charge. He also extended the time for appealing. Issues were taken on these actions by the applicants' solicitors as well as the procedure.
- [16] The second respondent then proceeded to give his decision after the applicants' Solicitors and the first respondent made submissions.

Judicial Review

- [17] The judicial review was initially brought against the decision of the first respondent dated 30 July 2015 and part of the decision made by the second respondent dated 22 October 2015 following an appeal pursuant to section 12F of the Civil Aviation Authority of Fiji Act 1979. By his decision, the second

respondent directed the first respondent: *'to put proper charges with full particulars to the applicant within 21 days afresh together with documentary evidence against the Applicant and to reconsider the decision after the Applicant has been provided [with] an opportunity to respond.'*

- [18] The second respondent set aside the first respondent's decision. No reasons were provided in the decision of the second respondent dated 22 October 2015. A clarification was provided and the respondents conceded that the decision was set aside on the basis that the applicants had not been afforded a fair hearing by the first respondent when the first respondent dealt with the charges against them (the applicants). As a result, the applicants discontinued the application against the first respondent. The second and third respondents have by virtue of this conceded that the challenge to the decision of the first respondent was justified.
- [19] The applicants apply for judicial review of the Second Respondent's decision of 22 October 2015, in part.

The Law

- [20] The right to appeal from a decision made pursuant to the Air Navigation Regulations (ANR) is found in section 12F of the Civil Aviation Act of Fiji (CAAF Act), which provides:

"12F Any person who is aggrieved by the Authority's decision on the refusal, withdrawal, revocation, variation or suspension of an aviation document may appeal to the Chief Executive for the review of the Authority's decision."

Submissions

- [21] The applicants contend that section 12F does not allow the second respondent to refer the matter to any other person to reconsider. The authorized person falls within the Authority whose decision the second respondent is to review on appeal. The respondents have misconceived section 12F of the CAAF Act. The Act enables an appeal to the Chief Executive Officer to review the Authority's decision confined to the refusal, withdrawal, revocation, variation or suspension of an aviation document (matters). Every appeal involves a review of a decision

appealed against. There is no restriction as to the right of appeal on the matters permitted by section 12F as found in that section. Any appeal in an ordinary way (unless there is a restriction by law) can be on grounds of law alone, or facts alone or mixed grounds of fact and law.

- [22] The respondents submit that the appellants during the appeal process were given proper opportunity to be heard and were treated with fairness. The decision made sets aside suspensions and requires a reconsideration. There is no issue of being fined for the same offence, they appealed and were partially successful in their appeal. In fact, there is no complaint as to the processes of the appeal that was dealt with by the second respondent, the main complaint is the effect of the decision i.e. the reconsideration. The respondents further argue that the applicant did not object to the procedure of appeal and waived any right of objection for the matter to be set for reconsideration. The second respondent has not delegated his powers under section 12F, the matter will be placed before another Controller of air safety who will reconsider the matter afresh.

Discussion

- [23] The applicants have applied for judicial review and seek an order in the nature of writ of certiorari to remove and quash part of the decision made by the second respondent on behalf of the CAAF dated 22 October 2015 on an appeal pursuant to section 12F CAAF Act directing the Controller of Air Safety (first respondent) *to put proper charges with full particulars to Timothy John Joyce and Captain Lepani Naloma (the applicants) within 21 days afresh together with documentary evidence against the applicants and to reconsider the decision after the applicants have been provided [with] an opportunity to respond (the decision).*
- [24] The decision is challenged on the grounds of 1. *Ultra vires* and illegality, 2. Procedural impropriety, 3. Breach of natural justice and 4. Breach of Constitutional Rights.
- [25] On 13 November 2015, after the respondents provided with the clarification, this Court [I] by consent ordered:

“THAT the First Respondent’s decision was set aside by the Second Respondent on the basis that the Applicant was not afforded a fair hearing by the First Respondent when the First Respondent dealt with the charges against the Applicant(s)”.

- [26] The applicants seek a writ of certiorari (*the quashing order*) and writ of prohibition (*the prohibiting order*).
- [27] The quashing order and the prohibiting order are complimentary remedies, based upon common principles so that they can be classed together. A quashing order issues to quash a decision which is ultra vires. A prohibiting order issues to forbid some act or decision which would be ultra vires. The quashing order looks to the past, a prohibiting order to the future. In this way, they are respectively comparable to the declaration and injunction in the sphere of private law remedies. Like private law remedies, they may be sought separately or together (see Administrative Law, 11th ed. By H.W.R. Wade & C. F. Forsyth).
- [28] In judicial review proceedings, the court's basic power is to 'quash' the challenged decision i.e. to hold it to be invalid.

Partial Invalidity

- [29] An administrative act may be partially good and partially bad. It often happens that a tribunal or authority makes a proper order but adds some direction or condition which is beyond its powers. If the bad can be cleanly severed from the good, the court will quash the bad part only and leave the good standing. One example was where a licensing authority allowed an applicant's appeal but wrongly ordered to pay costs, which it had no power to do; the court quashed only the order as to costs (*R v. Bournemouth Licensing Justices ex p Maggs* [1963] 320).
- [30] In *Bowman v. Stace and State Services Commission* [1972] NZLR 78, a disciplinary board validly acquitted a public servant on some charges but invalidly convicted him on others.

Standing

- [31] The applicants must have sufficient standing (*or locus standi*) to challenge the performance of a public function by the procedure of judicial review. The primary concern of administrative law is not simply to control the performance of public functions but rather to exercise control in the interest of persons affected in particular ways. The requirement of standing applies only to cases in which the claimant alleges that a public functionary has committed a public law wrong. Breaches of the rules and principles of administrative law are public law wrong in this sense.

- [32] The applicants have been affected by the decision. Therefore, the applicants have sufficient interest to apply for judicial review of the decision. The applicants' standing in this matter was not in dispute.

Reviewable decision

- [33] A decision is reviewable through the procedure of judicial review if it was made in exercise of a public function. The CAAF is a public functionary. The first respondent (the Controller of Air Safety of CAAF) and second respondents (the CEO of CAAF) perform a public duty. The first respondent's decision may be appealed to the second respondent. There is no further appeal against the second respondent.
- [34] A function is public if the functionary operates as an integral part of a public statutory scheme of regulation or service provision (see *R v Disciplinary Committee of the Jockey Club ex p. Aga Khan* [1993] 1 WLR 909 per Hoffmann L.J.).
- [35] CAAF operates an integral part of a public statutory scheme regulated under the CAAF Act. As such, the second respondent's decisions are amenable to judicial review. It was also not in dispute that the second respondent's decision is subject to administrative law and judicial review.

The Issue

- [36] The principal issue in these applications is whether the second respondent had acted *ultra vires* (without jurisdiction) in directing the Controller of Air Safety to put proper charges with full particulars to the applicants within 21 days afresh together with documentary evidence against the applicants and to reconsider the decision after the applicants have been provided with an opportunity to respond, when deciding an appeal made to the second respondent by the applicants pursuant to section 12F, CAAF Act.

Withdrawal of Charges

- [37] It is not in dispute that on appeal by the applicants to the second respondent, the first respondent withdrew all 47 charges (charges were not numbered but were in bullet point) against each of the applicants. On appeal, the first respondent also advised that he was proceeding with one charge against the first applicant

and 10 charges against the second respondent (see annexures TJJ-14 and LN-14 in the affidavits of first and second applicants sworn on 28 and 29 October 2015 respectively). However, the first respondent did not specify the charges that he wished to proceed with against the applicants. He could not do so since the charges were bullet pointed.

[38] Upon withdrawal of the charges (on appeal), the second respondent rightfully uplifted all the suspensions against the applicants in relation to their appeals and also revoked all adverse notations against them arising from these particular cases; and the second respondent further directed that the charges to be reconsidered by the controller after the applicants have been provided with an opportunity to respond to the allegations against them (see *TJ-22 & LN-22*, the letters sent to the applicants by the second respondent).

[39] In these proceedings, I will look at the legality of the second respondent's decision particularly his direction given to the first respondent to reconsider the charges. One of the purposes of the judicial review is to ensure that an applicant is given a fair treatment by the decision-making body in question. The judicial review jurisdiction is supervisory in nature. The Court confines itself to the question of legality when reviewing a decision (see *State v Arbitration Tribunal, Ex parte Hussein* [2006] FJHC 116; JR 1 of 2004 (23 February 2006)).

Ultra Vires-illegality-Acting outside power under the Act

[40] The second respondent had decided the appeals preferred by the applicants against the first respondent's decision. Under section 12F, the applicants were entitled to appeal to the second respondent if they were dissatisfied with the first respondent's decision. Section 12F of the CAAF Act enables the second respondent to decide an appeal from the first respondent's decision.

[41] The applicants submit that this was *ultra vires* the powers of the second respondent given under section 12F. Section 12F does not allow the second respondent to refer the matter to any other person to reconsider. The applicants further submit that the second respondent's circular in this regard is in contravention of section 12F in so far as it provides that the second respondent will only hear the appeal on merits.

[42] On the other hand, relying on the circular, the respondents argue that the second respondent has not delegated his powers under section 12F; the matter will be

placed before another Controller of Air Safety who will reconsider the matter afresh.

[43] The circular relied upon by the respondents states:

"The appeal is on the merits of the decision and the Chief Executive is limited to considering the records of the evidence, other evidence that was not available at the time the decision was made by the respective Controllers will not be considered. In making its determination at the review, the Chief Executive may confirm the Authority's decision or, if he finds the decision is unjustified, he may refer the matter to the respective Controllers for reconsideration.

"The Review will be based on the documents supplied (Brief, Applicant's Representation, Comments by the Respective Controller on the Applicant's Representations, Comments by the Applicant on Brief).

The review will be undertaken by the Chief Executive solely based on the documents".

[44] In *R v. Stepney Corporation* [1902] 1 KB 317, it was stated that: it is worth noting that under the statute the claimant was entitled to appeal to the Treasury if he was dissatisfied with the council's decision on compensation; but this did not mean that the council was not under an obligation to decide the matter in exercise of its own discretion first; **an appeal is not a substitute for a first instance decision.**

[45] Lord Diplock in the famous GCHQ case (*Council of Civil Service Union v. Minister for Health Service* [1985] AC 375 at 410F said that:

"the decision maker must understand correctly the law that regulates his decision making powers and must give effect to it."

[46] It is worth noting that even subjective statutory language ought to be given an objective interpretation. In *Padfield v Minister of Agriculture, Fisheries, and Food* [1968] AC 997, where the Minister had the power to refer to an investigation committee complaints about the decisions of the Milk Marketing Board fixing milk prices, it was held that:

"The Minister was under a duty to give proper consideration to the question whether to refer the complaint, and that any such decision had to be based on good reasons."

- [47] If the decision maker goes beyond the scope of his authority and powers conferred upon him by the enabling legislation, he would be acting *ultra vires* and illegally in the administrative law sense (*Brungate v I.L.E.A* [1989] 1 WLR 542).
- [48] The question arises, whether the second respondent had jurisdiction to give further directions for the matter to be referred back to the first respondent to lay fresh charges and for the matter to be reconsidered against both the applicants after uplifting the suspension imposed by the first respondent following the withdrawal of charges by the first respondent on appeal.
- [49] The enabling section for the second respondent to decide an appeal from the decision of the first respondent is 12F, which states that: *Any person who is aggrieved by the Authority's decision on the refusal, withdrawal, revocation, variation or suspension of an aviation document may appeal to the Chief Executive for the review of the Authority's decision.*
- [50] The second respondent delivered his decision on 22 October 2015. By his decisions, the second respondent merely advised that he had considered the complaints of lack of natural justice and was referring the matter back to the first respondent who was to put fresh charges and documentary evidence for the first respondent to reconsider the charges. The second respondent emphasised that he had not considered the merits of the appeal.
- [51] Subject to three ways qualifications, breach of natural justice renders a decision invalid and a nullity. First, a party who loses the right to be heard through his or her own fault or that of legal adviser, cannot complain breach of natural justice (*R v. Lancashire CC, ex p. Huddleston* [1986] 2 All ER 941). Secondly, it is probably the case that only person who would have standing to challenge a decision for breach of natural justice would be the person denied a hearing or whose case was heard by a biased tribunal. Thirdly, courts are prepared to deny a remedy for breach of natural justice if they consider that the breach caused no real prejudice because, for example, a hearing would have done no good. None of these qualifications is applicable to the present case at hand.
- [52] Having accepted that proper natural justice was not afforded to appellants (applicants) and as consequence, a fair hearing did not take place; and after the charges were effectively withdrawn by the first respondent at the appeal stage, the second respondent had quashed the decision of the first respondent. Accordingly, the second respondent uplifted the suspensions imposed on the

applicants by the first respondent. In addition, the second respondent referred the matter back to the first respondent who was to put fresh charges with documentary evidence for the first respondent to reconsider the charges.

- [53] The applicants submits that first respondent's withdrawal of the charges and the disclosure of the particulars of the charges at the appeal stage were all done with the intent to cover the defects in his prosecution and decision making. They cite the case authority of *Leary v National Union of Vehicle Builders* [1970] 2 All ER (pg. 720), where Megarry J held:

".....If one accepts the contention that a defect of natural justice in the trial body can be cured by the presence of natural justice in the appellate body, this has the result of depriving the member of this right to appeal from the expelling body. If the rules and the law combine to give the member the right to a fair trial and the right of appeal, why should he be told that he ought to be satisfied with an unjust trial and a fair appeal? Even if the appeal is treated as a hearing de novo, the member is being stripped of his right to appeal to another body from the effective decision to expel him. I cannot think that natural justice is satisfied by a process whereby an unfair trial, although not resulting in a valid expulsion, will nevertheless have the effect of depriving the member of this right of appeal when a valid decision to expel him is subsequently made. Such a deprivation would be a powerful result to be achieved by what in law is a mere nullity; and it is no mere triviality that might be justified on the ground that natural justice does not mean perfect justice. As a general rule, at all events, I hold that a failure of natural justice in the trial body cannot be cured by a sufficiency of natural justice in an appellate body." (Emphasis added)

- [54] The enabling section 12F does not empower the second respondent to refer the matter back to the first respondent for reconsideration. Section 12F does not state how an appeal is to be decided or orders that could be made by the CEO (second respondent) in deciding an appeal.

- [55] It is submitted on behalf of the second respondent that: with appeal Chief Executive Officer clearly agreed with the vast submission made that the proceedings initially adopted was flawed due to certain aspects and in his power and in authority re-directed the matter be reconsidered afresh.

- [56] In his letter of 5 November 2015, the second respondent states:

"1. The file will be remitted to another competent person to take appropriate action for the breaches committed in accordance with relevant laws and regulations.

2. I have noted from your appeal that the procedures may not have been followed hence I have asked that his be rectified. This is not addressing the Appeal itself but an action afresh so it will be fair to your client.

3. I have not considered the merit or otherwise of the Appeal and have also not looked at the Appeal on the issue of whether or not your clients are without fault.

4. I am also aware that in any Judicial Review proceedings, the Court also has the power to remit the matter back for reconsideration.

Your complaint initially was that your client's were not accorded natural justice during the investigations and decision making process hence your client's claim that a fair hearing did not take place.

I have remitted the file back to another competent person in that all can be accorded that has been complained off."

[57] In order to justify the referral or direction for reconsideration, the respondents rely on the circular (the second respondent's own circular) which permits the second respondent to refer the matter to the Controller for reconsideration.

[58] Section 12F provides that any person who is aggrieved by the Authority's decision on the refusal, withdrawal, revocation, variation or suspension of an aviation document may appeal to the Chief Executive for the review of the Authority's decision. It does not say the appeal will be heard on merits only. The respondent's circular limits the grounds of appeal to that of merits only. An appeal may be made on the procedural ground or on the ground of merits or on both. The circular also authorises the second respondent to refer the matter to the respective Controllers for reconsideration.

[59] In my opinion, the respondents are not entitled to use their own circular to supplement a statutory provision i.e. section 12F. Only the circular provides that the appeal will be heard on merits; and that the Chief Executive may refer the matter to the respective Controller for reconsideration, not section 12F. A circular cannot override a statutory provision. A statutory provision can only be amended or deleted through an Act of parliament.

[60] The decision maker must understand correctly the law that regulates his decision making powers and must give effect to it. Even subjective statutory language ought to be given an objective interpretation. The second respondent derives powers and authority from section 12F to decide appeals from the first respondent's decision. The second respondent was under a duty to give proper consideration to the appeal that was before him. Section 12F regulates the second respondent's decision making powers and he must give effect to it. The enabling statute (section 12F) does not give power to the second respondent to refer the matter that was under appeal before him to the first respondent to reconsider the charges, especially when the charges were effectively withdrawn at the appeal stage. In my view, in referring the matter to the first respondent for reconsideration, especially after quashing the first respondent's decision upon withdrawal of the charges in appeal, the second respondent had acted without jurisdiction and illegally. The quashing order made by the second respondent upon the withdrawal of charges in the appeal should operate as an acquittal of the applicants from the withdrawn charges, and the appeal should have rested there as there was nothing to be decided further.

[61] In light of my conclusion that the second respondent had acted without jurisdiction and illegally, I believe that there is no need to consider other grounds relied upon by the applicants for seeking judicial review.

Conclusion

[62] For the reasons set out above, I conclude that the second respondent had acted without jurisdiction and illegally when directing that the matter is to be referred back to the Controller for proper charges with full particulars of each breach alleged to have been committed to be put to the applicants within 21 days from the date hereof, afresh. I am satisfied that there are grounds for issuing quashing orders (writ of certiorari) to remove the second respondent's this particular part of his decision dated 22 October 2015. The second respondent's decision is partially good and partially bad. He made a proper order setting aside the suspensions imposed on the applicants by the first respondent upon withdrawal of charges at the appeal stage but added some direction which is beyond his powers. If the bad can be cleanly severed from the good, the court will quash the bad part only and leave the good standing. I accordingly issue a writ of certiorari to remove the bad part of the second respondent's decision.

The Final Outcome

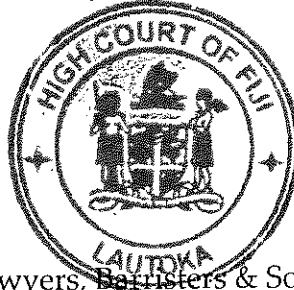
1. Writ of certiorari (quashing order) issued quashing the bad part of the second respondent's decision dated 22 October 2015.
2. The second respondent's direction (the bad part of his decision dated 22 October 2015) that the matter is to be referred back to the Controller for proper charges with full particulars of each breach alleged to have been committed to be put to the applicants within 21 days from the date hereof, afresh be quashed.
3. The respondents will pay summarily assessed costs of \$1,500.00.

M. H. Mohamed Ajmeer

9/4/18

M. H. Mohamed Ajmeer

JUDGE



At Lautoka
9 April 2018

Solicitors:

For the applicants: Messrs AK Lawyers, Barristers & Solicitors

For the respondents: Messrs Patel & Sharma Lawyers, Barristers & Solicitors