

IN THE HIGH COURT OF FIJI AT SUVA

CIVIL JURISDICTION

CASE NUMBER: HBJ 11 OF 2014

BETWEEN: THE STATE

AND: PUBLIC SERVICE COMMISSION
RESPONDENT

EX-PARTE: SAVERIO BALEIKANACEA
APPLICANT

Appearances: Mr. Matsamou for the Applicant

Ms. Taukei for the Respondent.

Date/Place of Judgment: Wednesday 20 February 2019 at Suva.

Coram: Hon. Madam Justice Anjula Wati.

JUDGMENT

A. Catchwords:

JUDICIAL REVIEW – Employment of Applicant terminated on grounds of redundancy without sufficient notice and consultation and without the applicant being heard – whether the principles of natural justice breached by the employer – whether the redundancy procedure outlined in the ERA applied to PSC at the critical time – Whether the actions of the employer in transferring the employee to a position for which he was made redundant carried out in terms of the procedure stipulated for transfer – the merits of the redundancy cannot be examined in a judicial review procedure- although the steps taken by the employer was legally flawed for want of compliance with proper procedure, there ought not to be any remedies granted

as the applicant is now retired from employment and any such remedies would be ineffective in the circumstances.

B. Legislation:

1. *Employment Relations Act 2007 ("ERA"); s. 3; and s. 107.*
2. *Public Service General Regulations, 1999 ("PSGR"); s. 13.*

C. Cases:

1. *Annetts and Another v McCann and Others (1990) 97 ALR 177.*
2. *Kioa v West (1985) 159 CLR 550; 62 ALR 321.*

Cause/Background

1. The matter before me is the substantive application for judicial review by the applicant Mr. Saverio Baleikanacea. The applicant is challenging his transfer to the PSC on 1 April 2014 and the redundancy on 3 May 2014. In a nutshell, he avers that the transfer and the termination of employment on the grounds of redundancy was in breach of the procedure set out by the relevant laws and also in breach of the principles of natural justice.
2. At the outset, I must make it clear that notwithstanding my findings, I will not be ordering any relief or remedy in the matter. The applicant has now past his retirement age. He was 53 at the time the issues surrounding his transfer and termination of employment came about. In fact, as far as this matter is concerned, the issues are now academic. The matter cannot be sent back to the employer for reconsideration on proper procedure.
3. The application for leave to apply for judicial review out of time was granted by the Full Court on 23 February 2017 on an appeal from the High Court. Hon. Justice Alfred in hearing the application for leave to apply for judicial review out of time had refused to grant the application and also dismissed the application for leave.
4. The Court of Appeal found that the High Court had erred in failing to consider some of the following facts, which in the Full Court's view, could constitute breach of natural justice:

1. *The sudden transfer without following the requirements of s. 13 of the PSGR and its impact.*
2. *Whether the position was in fact redundant;*
3. *Whether there was an element of "mala-fides" in relation to the termination when the applicant was not allowed an opportunity to be heard.*
4. *Whether there was procedural impropriety.*
5. In form of brief background, the applicant was employed by the PSC since 13 December 1988. He was employed first as an Administrative Officer in the Industrial Relations Division of the PSC. Since then, he served in different capacities at the PSC. He was promoted to various posts.
6. Since 19 August 1999, the applicant was posted outside the PSC as Deputy Secretary in various Ministries. On 1 November 2010, he was posted to the Ministry of Local Government, Urban Development, Housing and Environment as the Deputy Secretary.
7. On 1 April 2014, he was transferred to the PSC with immediate effect. He reported to PSC as per the requirement of his transfer letter. The applicant says that he was sick on 1 and 2 April and he gave a sick sheet for his absence. When he reported to work on 3 April, he was informed by the PSC to go on leave. The applicant says that he did not want to go on leave but he did so as he felt that that was the instruction that he had to follow.
8. He therefore wrote a letter asking for leave to formalize the same. He wrote to go on leave from 3 April 2014 to 2 May 2014.
9. On 24 April 2014, he was called to report to the employer for discussion. He did and was told that there was no post vacant at the PSC and as a result he was to be made redundant. This was confirmed by a letter dated 24 April 2014. The redundancy was to take effect from 3 May 2014.

10. The applicant was paid \$34,486.05 in redundancy pay. He was also paid \$5,517.68 for 28 days of long service leave and \$2, 207.07 for 8 days of annual leave. It is against that background that the proceedings are brought.

Law and Determination

11. There are two aspects that the applicant is challenging. The first is the transfer and the second is the redundancy. I will deal with both under separate heads.

A. Transfer to PSC: 1 April 2014

12. On the question of transfer, Mr. Maisamoa argued that Regulation 13 of the PSGR was not followed when the applicant was immediately transferred to the PSC. He asserted that the law requires that the employee be given 28 days' notice of the transfer, an opportunity to state his or her views, and to consider the same. There was non-compliance with this law.

13. Ms. Laukei argued that the Permanent Secretary of the PSC had powers to transfer an employee. When such powers were exercised and the applicant transferred with immediate effect, he did not raise any objections to the same. He accepted the transfer. He later raised issues on the reasons for the transfer which was not given to him because it is a known fact that there is a need for movements to be made within different Ministries from time to time.

14. In my view, no one is challenging the powers of the Permanent Secretary to transfer the employee. The issue before the court is the procedure that the Permanent Secretary must invoke in carrying out the powers. The Permanent Secretary has no powers to ignore, flout or bypass the procedures set by the law unless he has been granted an exception by the law.

15. Further, what the applicant did after the transfer is not under scrutiny. He may not have raised any objections then, simply because he was not allowed the opportunity to raise any objections. I say this because there is no evidence of compliance with Regulation 13 of the PSGR.

16. This takes me to s. 13 of the PSGR which reads:

"The Commission may transfer the employee without the employee's agreement only if the Commission has-

(a) 28 days written notice of the transfer;

(b) given the employee an opportunity to state his or her views about the transfer; and

(c) considered any views stated by the employee.

17. I reiterate that there is no evidence that the Permanent Secretary complied with the law. His view in his affidavit was simply that the contract provides for the transfer and so he carried out the same. He has not addressed in his affidavit why he did not comply with the law.

18. Ms. Taukei stated that the applicant made no objections regarding his transfer. He could have only done so if he was asked in writing to do so as required by the law. That is the best practice that should be adapted by any employer. In absence of proper procedure being afforded to the applicant before transferring him, which procedure also provides an opportunity to be heard, I find that the powers to exercise the transfer was procedurally improper and unfair.

B. The Redundancy : 3 May 2014

19. Mr. Maisamoa argued that the PSC should have followed s. 107 of the ERA in carrying out the redundancy. Ms. Taukei argues that s. 107 of the ERA, at the time of the redundancy, was not applicable to the PSC.

20. The redundancy was made effective on 3 May 2014. At that time the ERA did not apply to the PSC by virtue of s. 3(2). *See Act 21 of 2011*. The provision as it then was read:

"This Promulgation does not apply to the Government, including the Public Service Commission,..."

21. The above provision was later amended by Act 1 of 2016 which in essence now states that the PSC is bound by the Act.

22. Apart from the provisions of s. 107 of the ERA, I am not shown any other prescribed contractual or legal procedure which ought to have been followed at the time the redundancy was carried out.
23. Having said that, I must say that it is a fundamental principle of law that a party must be given an opportunity to be heard in respect of a decision that is likely to affect his livelihood. In this case also, there is no evidence that the applicant was heard or given any opportunity to consult the employer when such a drastic decision was made to make him redundant.
24. The employee was entitled every right to question and be heard on why he was transferred to a position when there was no vacancy. He had been in service with the State for almost 26 years, being half of his life, when he was terminated. He was entitled to be consulted and heard on his views and provided explanation and ways to minimize the effect of the redundancy. The employer had in my view breached a very fundamental principle of law and therefore making the process procedurally unfair.
25. I reinforce my findings with what Mason CJ, Deane and McHugh said in *Annetts and Another v McCann and Others* (1990) 97 ALR 177 at 178,

"It can now be taken as settled that, when a statute confers power upon a public official to destroy, defeat, or prejudice a person's rights, interests or legitimate expectations, the rules of natural justice regulate the exercise of that power unless they are excluded by plain words of necessary intendment..."

26. Further, in *Kioa v West* (1985) 159 CLR 550; 62 ALR 321, Mason J said (CLR at 584; ALR at 346) that the law in relation to administrative decisions:

"... has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to clear manifestation of a contrary statutory intention".

27. Ms. Taukei has not identified to me any law which excludes the applicant's rights to require natural justice in a situation where he is being made redundant in the manner he was after having served the State for over two and a half decades. In absence of that, I find that the requirement of natural justice could not have been overlooked.

28. Whether the redundancy was warranted in the circumstances is not for me in a proceeding for judicial review to consider. I am simply concerned with the propriety of the procedure and the powers. I find that the redundancy was not carried out with the basic requirement of natural justice.

Final Orders

29. I find that the transfer and redundancy both were procedurally unfair in that there was non-compliance of the law and the principles of natural justice. Notwithstanding my findings, I find that the grant of any remedy(s) would be ineffective for the reasons explained in paragraph 2 above. I therefore decline to make any orders in this matter except for orders regarding costs.

30. I order that the applicant should have costs of the proceedings in the sum of \$2,500 as there were no further papers or pleadings filed after the matter was remitted to High Court. The parties also did not file any submissions. There was minimal disbursement as a result.



Anjala Wati

Judge

20.02.2019



To:

1. *Matsyama & Associates for the Applicant.*
2. *Attorney-General's Chambers for the Respondent.*
3. *File: HBJ 11 of 2014.*