IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

HBJ No. 10 of 2021

IN THE MATTER of ss. 112 and 116 *inter alia* of the Constitution of the Republic of Fiji **(Constitution)**

A N D

IN THE MATTER of the suspension and subsequent termination of the appointment of the Applicant as Solicitor-General

BETWEEN : **SHARVADA NAND SHARMA,** legal practitioner, of 9 Tagimoucia Place, Laucala Beach Estate, Nasinu

APPLICANT

AND : **THE PRESIDENT OF THE REPUBLIC OF FIJI,** of Government House, Suva

FIRST RESPONDENT

AND : **THE JUDICIAL SERVICES COMMISSION,** of Government Buildings, Suva

SECOND RESPONDENT

AND : **THE ATTORNEY-GENERAL OF FIJI**, Attorney-General's Chambers, Suvavou House, Suva

THIRD RESPONDENT

Counsel:
Applicant: J. Apted
Respondents: D. Sharma and Ms. Fatima G

JUDGMENT

INTRODUCTION

1. Applicant was the former Solicitor General, filed this application seeking leave for judicial review relating to six decisions including the decision to termination of his employment. First decision was a decision of second respondent, to advise first Respondent to suspend Applicant from office. (First Decision). Next was decision of first Respondent of 20.9.2021 acting upon the advice of second Respondent to suspend Applicant from office without pay

(Second Decision). Third Decision was refusal of second Respondent to advise first respondent, to reinstate the salary (third Decision). This was based on a communication dated 01.10.2021 by solicitors of second Respondent. Forth Decision was decision of on second Defendant, or about 04.11.2021 to demand explanation to *inter alia* more than thirty one queries, within two days. (Forth Decision). Fifth Decision was made on or about 10.11.2021 to advise first Respondent to terminate Applicant (Fifth Decision) , and the sixth Decision was decision of first Respondent to terminate Applicant from his office made on 10.11.2021.(Sixth Decision). Application for leave for Judicial Review was opposed. The main objections contained in the written submission of the Respondents were that Applicant can be suspended from his office in terms of Section 112(4) of the Constitution of the Republic of Fiji(the Constitution), Section 104(2), 104(6), Section 138(9) of the Constitution empowers second Respondent to investigate complaints against applicant and accordingly requested the Applicant on 4.11.2021 to respond to questions by 6.11.2021, Applicant had failed to do so and time period allocated was sufficient for the purpose, hence he was removed from his post without appointing a tribunal in terms of Section 112(3) of the Constitution. Respondents also contend that the facts are disputed and or there is alternate remedy and or there is no public law element, and or second Respondent's decisions cannot be challenged in court, hence not suitable for Judicial Review. In terms of Section 116 (10) of the Constitution the procedure for removal of the Applicant is found in Section 112 of the Constitution, which is the 'procedure for removal of judicial officer for cause'. On 20.9.2021 Applicant was suspended from his position in terms of Section 112(4) of the Constitution. Said letter stated that the reason for suspension were 'allegation of misbehaviour' and said suspension was without pay, benefits or allowances, '**pending the appointment of a Tribunal as approved for under Section 112 of the Constitution of the Republic of Fiji.**' No such Tribunal was appointed but Applicant was terminated. Before the termination, Applicant had sought eight days instead of two days to respond to specific thirty one quarries contained in the letter of 4.11.2021 but this was denied on 5.11.2021. On 6.11.2021 Applicant had denied all the allegations of 'misbehaviour' arising from the complaint of Supervisor of Elections (SOE) which relate to all the specific thirty one queries. Decisions of second Respondent are subject to Judicial Review in terms of Section104 (8) of the Constitution. Hence removal procedure for a judicial officer (which is applicable to Applicant) is not a private law issue and the objection on alternate remedy through Employment Relations Act (ERA) cannot deny the access to judicial review in general to all the six decisions. These decisions are dealt separately in the judgment. Leave for judicial review is granted to all the decisions as there are sufficient grounds to grant leave for Judicial Review.

Facts

2. The appointment of the Solicitor-General is made under Section 116(5) of the Constitution of the Republic of Fiji (the Constitution). The appointing authority is first Respondent, who appoints the Solicitor-General on the recommendation of second Respondent, following consultation by second Respondent with third Respondent.

3. The Solicitor-General's responsibilities are set out under Section 116(2) of the Constitution.

4. Section 116(2)(a) of the Constitution, requires the Solicitor-General to provide independent legal advice to Government and to the holder of a public office, on request; and Section 116(2)(d), which requires the Solicitor-General to represent the State in court in any legal proceedings to which the State is a party, other than criminal proceedings.

5. Applicant held the office of Solicitor General and was removed from office and this application is seeking to review the decisions of the said removal.

6. The removal was pursuant to alleged misbehaviour arising from professional conduct of an action in court. Applicant seeks judicial review of decisions relating to his removal.

7. Applicant seeks leave to take judicial review of the following six decisions of the First Respondent and the Second Respondent –

   (a) The decision of the second Respondent on 20.9. 2021 to suspend from his office.

   (b) The decision of first Respondent 20.9. 2021, acting upon the advice of second Respondent, to suspend the Applicant from office without pay 'pending an appointment of Tribunal in terms of Section 112 of the Constitution.'

   (c) The decision of second Respondent, on or about 1.10.2021 that it would not advise the President to pay salary while on suspension of Applicant.

   (d) The decision of the Second Respondent, on or about 4 .11. 2021 to request from the Applicant an explanation in writing as to the allegations and for a response to more than thirty one specific queries to be provided by 06.11.2021, and the decision of second Respondent on or 05.11. 2021 to refuse to extend time by one week.

   (e) The decision of second Respondent, on or about 10.11. 2021 to advise the President to terminate the appointment of the Applicant

   (f) The decision of first Respondent, on 10.11.2021 to terminate the appointment of the Applicant.

8. Termination of Applicant relate to manner of conducting a case involving SOE and complaint made by him to the second Respondent on 14.9.2021.

9. The affidavit filed on behalf of the Respondents by the Chief Registrar states *inter alia*

   (a) Second Respondent gave advice to the first Respondent to suspend the Applicant pending the investigation pending 'the investigation and determination of the complaint' by second Respondent.(There was no decision of second Respondent annexed)

   (b) Letter of suspension was consistent with the advice given. (no letter of advice to first Respondent annexed).

(c) Applicant already had complaint of SOE to the Prime Minister annexed as SS1 dated 17.9.2021 to the affidavit of Applicant.

(d) Second Respondent is empowered to investigate the complaint of SOE received on 14.9.2021.

(e) A salaried suspension is not contemplated in Section 116 and 112 of the Constitution.

(f) Second Respondent was advised about the above position regarding suspension without salary (again this advice is not annexed).

(g) Applicant requested resolution of issue regarding payment of salary by 1.10.2021 and failure to take legal action on that.

(h) On 1.10.2021 Applicant was informed that he would remain suspended without salary (Annexed SS4 to affidavit in support), but no legal action was taken.

(i) On 4.11.2021 a letter containing more than thirty one queries, was handed over to Applicant and at paragraph 6 of that letter stated that before setting out a Tribunal, answers were needed to decide on the complaint of SOE.

(j) Applicant was given time till 4pm on 6.11.2021 to reply.

(k) Applicant did not answer specific questions individually, though he had access to legal services and his own legal experience to answer them.

(l) Applicant was not granted an extension of time to reply.

(m) Applicant had denied the contents and or allegations without specifically replying to the said thirty one queries.

(n) Second Respondent had advised the first Respondent that there was sufficient evidence to consider misbehaviour of Applicant. (again no such evidence was provided except a complaint by SOE and denial of that by Applicant).

(o) Applicant's conduct 'when considered in it's entirely was tantamount to cumulative misbehaviour as the Applicant failed to respond, despite being encouraged to, to the correspondence pub to him by the Second Respondent.'

(p) Applicant was terminated by first Respondent on the advice of second Respondent.

(q) Applicant was paid his dues comprising of his outstanding annual leave, in accordance with the provisions of the Employment Relations Act 2007.

Analysis

10. Applicant has sufficient interest in the matter before court as he is directly affected by the removal from his position and seeking

judicial review of the said decision. This judgment deals with whether the leave should be granted to the Applicant pursuant to Order 53 rule 3(1) of High Court Rules 1988(HCR).

11. In the written submissions filed on behalf of the Respondents following facts were admitted,

(a) Applicant had filed relevant documents in terms of Order 53 rule 2 of HCR.

(b) Applicant has sufficient interest in the matter.

(c) Applicant was suspended without salary on 20.9.2021.

(d) Applicant was terminated from his position on 10.11.2021

12. Apart from the above it is not disputed:

(a) Applicant was suspended from his position on 20.9.2021 without salary.

(b) Second Respondent had not submitted any decision it had taken to suspend Applicant without salary.

13. In *Inland Revenue Commission v National Federation of Self Employed and Small Businesses Ltd* [1982] AC 617 643 –644 held, (Per Lord Diplock)

"The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into matter at any depth at that stage. If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration, turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him, leave to apply for that relief. The discretion that the court is exercising at this stage is not the same as that which is it is called upon to exercise when all the evidence is in and the matter has been fully argued at the hearing of the application."

14. In this application Applicant is not only seeking to review the final decision that terminated him from his post but also five additional decisions relating to the same process of termination taken before he his termination.

15. In *Fiji Airline Pilots Association v Permanent Secretary for Labour and Industrial Relations* (Civil Appeal No. ABU59u of 1997s, 27 .2. 1998), the Court of Appeal, held,

"The basic principle is that the Judge is only required to be satisfied that the material available discloses what might, on further consideration, turn out to be an arguable case in favour of granting

the relief. If it does, he or she should grant the application - per *Lord Diplock* in Inland Revenue Commissioners v National Federation of Self Employed, [1982] AC 617 at 644.."

16. Supreme Court in *Matalulu v Director of Public Prosecutions* [2003] FLR 129, (at pages 144-145) held that
"*It is not an occasion for a trial of issues in the proposed proceedings*. That having been said, the judge considering the grant of leave is entitled to have regard to a variety of factors relevant to the purpose of the rule, these include:

(1) Whether the proposed application is frivolous or vexatious or an abuse of the process of the court.
(2) Whether the application discloses arguable grounds for review based upon facts supported by affidavit.
(3) Whether the application would serve any useful purpose, e.g. whether the question has become moot.
(4) Whether there is an obvious alternative remedy such as administrative review or appeal on the merits which has not been exhausted by the applicant.
(5) Whether a restrictive approach to the grant of leave is warranted because the decision is one which is amenable to only limited judicial review."

Further held,

> "But where a proposed application for judicial review depends upon grounds involving assertions of law or fact which are manifestly untenable, then leave should not be granted."(emphasis added)

17. Accordingly the factors to be taken in to consideration at the stage of leave seeking judicial review cannot be precisely stated but, the guiding principle is that leave should be refused when there is no prospect of success at the hearing such as untenable legal argument on the face of it and it would be waste of time and resources to grant leave for judicial review.

18. At this point it is worth to consider grounds of objects to this application and Respondents opposed this application on following grounds:

i. Application is out of time
ii. There has been inordinate delay in making the application
iii. The decision is not susceptible to judicial review – that is, it is a private law matter relating to employment i.e. suspension, termination
iv. Clear alternative remedies were available to the Applicant and he deliberately chose not to pursue these.
v. The material available do not disclose an arguable case favouring the grant of the reliefs sought, or what might, on further consideration, be an arguable case?

Application is out of time and or there has been inordinate delay (Grounds i.and ii.)

19. This application relates to six decisions and the oldest decision out of six decisions, (which is the First Decision) taken on 20.9.2021 to suspend Applicant which was communicated by first Respondent to the Applicant. This Application was filed on 16.12.2021. This was despite Applicant's warning to the second Respondent to restore his salary during pendency of his suspension before 1.10.2021.

20. Order 53 rule 4(2) of the High Court Rules 1988, stipulate a time-limit of three months for the relief of *certiorari*, 'to remove judgment, order, conviction or other proceeding, for the purpose of quashing'.

21. Accordingly, this application was made within the said time period, hence the objection of delay to refuse leave is without merit, but this delay is relevant to the request for stay of the decisions under review which is dealt later.

22. Without prejudice to above, said objection relating to time, is not determinative at the stage of seeking leave, unless the court exercises its discretion to refuse. When an application is not filed within the stipulated time period discretion grated to the court in terms of Order 53 rule 4(1) of HCR so the delay is not determinative of the application.

23. Time period of three months is not mandatory in terms of Order 53 rule 4(1) of High Court Rules 1988, where court is granted discretion to consider such delay, to refuse an application for *certiorari*, considering inter *alia*, good administration, hardship or prejudice to third parties act.

24. As stated earlier, these considerations has no application when the application is filed within three months. In this case Applicant had filed seeking leave This is to prevent decisions being challenged, long after they were taken and quashing would affect 'substantial hardships' or 'prejudicially affect rights' of any person or when it is 'detrimental to good administration'. I do not need to consider these factors in this application as this was filed within three months' time period, but need to consider in an application filed outside three months' time period to grant or refuse extension.

25. This was held in Supreme Court, in *Public Service Commission v Singh* (Supreme Court of Fiji, Civil Appeal No. CBV0011 of 2008, 27 .8. 2010) no issue of delay arises where an application seeking the relief for certiorari within three months. The Supreme Court said at paragraphs 6-7 –

> "However, we think that both Courts were wrong on the second point, namely, whether the trial Judge could go on and consider delay when the application was filed within the 3 months period.
>
> The starting point is the relevant rule itself. A close reading of Order 53 Rule 4(1) shows that two situations were envisaged by the provision:

(a) Where there is delay in making an application for judicial review. The court may refuse to grant the relief sought in the application if it thinks that granting it would be likely to cause substantial hardship to, or substantially prejudice the rights of any person or would be detrimental to good administration.

(b) Where there is an application for leave to issue judicial review where the relief sought is an order for *certiorari*, and the application is made after the 3 months has expired, in such case, the trial judge is allowed to consider whether there was delay and whether the grant of relief is justified. The rule does not allow him to consider delay if the application was filed within the 3 months period. It is the result of an application of the rule of statutory interpretation *expressio unius est exclusio alterius."*

Justifiability -The decision is not susceptible to judicial review – alternative remedies were available.

26. The said contention is based on the premise that relief sought is a private law remedy as opposed to public law. This is based on the fact that Applicant's employment was terminated, hence an employment grievance under Employment Relations Act 2007 (ERA).

27. Respondents also contend that receipt of payment for his unused leave under ERA is a reason to deny judicial review. This argument is without merit as payment of statutory dues and recovery of them is a separate issue from justiciability under judicial review.

28. Respondents argue that Applicant should have applied to the Employment Relations Court for compliance orders under section 221 and 220(i) of ERA. The Respondents further contend, that the ERA allows anyone to bring an action that is "*founded on an employment contract*".

29. Applicant is appointed to the position of solicitor general in terms of Section 116 of the Constitution.

30. Section 116 of the Constitution states.

"(1) the office of the Solicitor-General established by the State Services Decree 2009 continues in existence.

(2) The Solicitor-General is responsible for—

(a) providing independent legal advice to Government and to the holder of a public office, on request;
(b) preparing draft laws on the request of Cabinet;
(c) maintaining a publicly accessible register of all written law;

(d) representing the State in court in any legal proceedings to which the State is a party, other than criminal proceedings; and

(e) performing any other functions assigned by this Constitution, any written law, Cabinet or the Attorney-General.

(3) The Solicitor-General, with the permission of the court, may appear as a friend of the court in any civil proceedings to which the State is not a party.

(4) The Solicitor-General must be a person who is qualified to be appointed as a Judge.

(5) The Solicitor-General shall be appointed by the President on the recommendation of the Judicial Services Commission following consultation by the Judicial Services Commission with the Attorney-General.

(6) **The President may, on the recommendation of the Judicial Services Commission following consultation by it with the Attorney-General, appoint a person to act as the Solicitor-General** during any period or during all periods, when the office of the Solicitor-General is vacant or when the Solicitor-General is absent from duty or from Fiji or is, for any reason, unable to perform the functions of office.

(7) The Solicitor-General has the same status as that of a permanent secretary and shall be responsible as the Permanent Secretary for the Office of the Attorney-General and may be assigned such additional responsibilities as permanent secretary.

(8) The **Solicitor-General shall have the same term of office as a Judge of the High Court,** and shall be paid such remuneration as determined by the Judicial Services Commission in consultation with the Attorney-General, provided however that such remuneration shall not be less than that payable to a Judge of the High Court or a permanent secretary and any such remuneration must not be varied to his or her disadvantage, except as part of an overall austerity reduction similarly applicable to all officers of the State.

(9) **The Solicitor-General may be removed from office for inability to perform the functions of his or her office** (whether arising from infirmity of body or mind or any other cause) **or for** misbehaviour, and **may not otherwise be removed**.

(10) **The procedure for removal of the Solicitor-General from office shall be the same as the procedure for removal of a judicial officer under section 112**" (emphasis is added)

31. Applicant is appointed on recommendation of second Respondent, with consultation of third Respondent for 'all periods'. Once appointed protection of the post is secured constitutionally. This is to secure independence and impartiality required for the post.

32. Removal of Solicitor General is stated in the Constitution, hence cannot be varied contractually. The interpretation of the Constitution is required for determination of legality of the termination which is secured in the Constitution.

33. The Constitution had secured the position of Solicitor General, in the same manner it had secured the tenure of 'judicial officer'. These are constitutional provisions that needs to be interpreted *sui generis*. This is different from interpretation of statute. So ERA cannot be applied to interpret constitutional provisions.

34. So in terms of Section 116(10) of the Constitution removal of Applicant from his office, is the same procedure for removal of 'judicial officer' under Section 112 of the Constitution. This is to give adequate protection to the office of Applicant. Even if there was a contract of employment the protection given in the Constitution cannot be removed or varied in order to remove the protection granted by the Constitution. So it is mandatory to follow the process stipulated in the Constitution, when a complaint against Applicant was dealt.

35. Section 112 of the Constitution States,

"(1) A Judge, Magistrate, Master of the High Court, the Chief Registrar or any other judicial officer appointed by the Judicial Services Commission may be removed from office for inability to perform the functions of his or her office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour, and may not otherwise be removed.

(2) Removal of a Judge, Magistrate, Master of the High Court, the Chief Registrar or any other judicial officer appointed by the Judicial Services Commission from office **must be by the President pursuant to this section.**

(3) If the **President, acting on the advice of the Judicial Services Commission, considers** that the question of removing a Judge, Magistrate, Master of the High Court, the Chief Registrar or any other judicial officer appointed by the Judicial Services Commission from office **ought to be investigated, then –**

(a) the President, **acting on the advice of the Judicial Services Commission, shall appoint –**

(i) in the case of alleged **misbehaviour**—a **tribunal,** consisting of a chairperson and not less than 2 other members, selected from amongst persons who hold or have held high judicial office in Fiji or in another country; and

(ii) in the case of alleged **inability to perform the functions of office** - a **medical board**, consisting of a chairperson and 2 other members, each of whom is a qualified medical practitioner;

(b) the tribunal or medical board enquires into the matter and **furnishes a written report** of the facts to the President and advises the President of its recommendation whether or not the Judge, Magistrate, Master of the High Court, the Chief Registrar or any other judicial officer appointed by the Judicial Services Commission should **be removed from office**; and

(c) in deciding whether or not to remove a Judge, the **President must act on the advice of the tribunal or medical board,** as the case may be.

(4) The President may, **acting on the advice of the Judicial Services Commission, suspend the Judge,** Magistrate, Master of the High Court, the Chief Registrar or any other judicial officer appointed by the Judicial Services Commission from office **pending investigation and pending referral** to and appointment of a tribunal or a medical board under subsection (3), and may at any time, revoke the suspension.

(5) The suspension of the Judge, Magistrate, Master of the High Court, the Chief Registrar or any other judicial officer appointed by the Judicial Services Commission from office under subsection (4) ceases to have effect if the President determines that the Judge, Magistrate, Master of the High Court, the Chief Registrar or any other judicial officer appointed by the Judicial Services Commission should not be removed from office.

(6) The report of the tribunal or the recommendations of the medical board, as the case may be, made under subsection (3) shall be made public.

(7) This section does not apply to the Chief Justice or the President of the Court of Appeal."(emphasis is added)

36. In terms of Section 112(4) of the Constitution Applicant was suspended from his post, pending investigation by a Tribunal, before removal.

37. From the above, Removal of Applicant is prescribed in the Constitution and application of constitutional provision can be interpreted in judicial review application as opposed to a civil remedy or through and 'employment grievance' in terms of ERA

38. In *P.P.Palani v Fiji Electricity Authority* (unreported) ABU0028 of 1996 Court of Appeal said (at pages 8, 10) –

"Lyons J., in our view correctly, commenced by saying that judicial review did not lie in a strict master and servant relationship. In our view the law is now clear that judicial review is only available where an issue or public law is involved in master and servant cases; it does not apply where the issue is a private law obligation. It is not always easy to determine just what is comprehended by expressions of "public law" and "private law" in this area. However, since they first became commonly used judgment of the Courts have developed our understanding of what is meant. In R. V. BBC. Ex parte Lavelle (1983)1 All E.R. 241 Woolf J at 248 said when dealing with an application for judicial review had extended the circumstances in which the prerogative remedies of mandamus, prohibition or certiorari were available.

In R. v. East Berkshire Health Authority, ex parte Walsh (1984) 3 All E.R. 425 it was held by the Court of Appeal that whether a dismissal from employment by a public authority was subject to public law remedies depended on whether there were special statutory restrictions on dismissal which underpinned the

employee's position and **not on the fact of employment by a public authority per se or the employee's seniority or the interests of the public in the functioning of the authority**. Sir John Donaldson M.R. in his judgment discussed the question of statutory underpinning in relation to three of the most well-known cases in this area, Vine v. National Dock Labour Board (1956) 3 All E.R. 939, Ridge v. Baldwin (1963) 2 All E.R. 66 and Malloch v. Aberdeen Corp (1971) 2 All E.R. 1278, and said at p. 430:

> "**In all three cases there was a special statutory provision bearing directly on the right of a public authority to dismiss the plaintiff.** In Vine's case the employment was under the statutory dock labour scheme and the **issue concerned the statutory power to dismissal was conferred by statute** (s. 191(4) of the Municipal Corporations Act 1882). In Malloch's case **again it was statutory** (s.3 of the Public Schools (Scotland) Teachers Act 1882). **As Lord Wilberforce said, it is the existence of these statutory provisions which injects the element of public law necessary in this context to attract the remedies of administrative law.** Employment by a public authority does not per se inject any element of public law. Nor does the fact that the employee is in a 'higher grade' or is an 'officer'. This only makes it more likely that there will be special statutory restrictions on dismissal or other underpinning and not the seniority which injects the element of public law. Still less can I find any warrant for equating public law with the interest of the public. If the public through Parliament gives effect to that interest by means of statutory provisions, that is quite different, but the interest of the public per se is not sufficient.

In R v Civil Service Appeal Board, ex parte Bruce (1988) 3 All E.R. 686 May L.J said at p 691:

> "The first issue in this case, therefore is whether the board's decision on the applicant's appeal against his dismissal is capable of challenge in this court by means of judicial review. This will only be if there was a public or administrative element in the board's jurisdiction to hear and decide such an appeal, in other words, whether an issue of public law was involved. The test is relatively simple to state, but by no means easy to apply. As Sir John Donaldson MR said in R V Panel on Takeovers and

Mergers exp Datafin plc (1987) 1 All ER 564 at 577,(1987) QB 815 at 838:

'In all the reports it is possible to find enumerations of factors giving rise to the jurisdiction, but it is a fatal error to regard the presence of all of those factors as essential or as being exclusive of other factors. Possibly the only essential elements are what can be described as a public element, which can take many different forms…' (emphasis is added)

39. Applicant had no contract of employment, and his removal can only be done in accordance with the Constitution. So removal of Applicant can only be dealt in judicial review. Even if he had a contract of employment, that does not preclude judicial review if he was removed in contrary to the provisions contained in the Constitution.

40. By contract the conditions relating to employment can be negotiated but removal can only be in terms of the Constitutional safeguards provided.

41. It is clear that there are constitutional provisions that required interpretation and application in this matter, and this cannot be done under ERA.

42. Proceedings under ERA cannot challenge all the six decisions, which are sought to be reviewed in Judicial Review application. So, ERA is not an alternate remedy for this application.

Application of Constitution

43. Section 82 of the Constitution makes clear that under the Constitution, the President of Fiji acts only in accordance with advice and state,

"*President acts on advice*

In the exercise of his or her powers and executive authority, the **President acts only** on the **advice** of Cabinet or a Minister or of some other body or authority prescribed by this Constitution for a particular purpose as the body or authority on whose advice the President acts in that case."(emphasis added)

44. Accordingly , the President can only act , on the 'advice the body on whose advice the President acts', and in this instance Judicial Services Commission(second Respondent), but the absence of a decision by said body to suspend without the salary makes first respondent a party affected by this application.

45. Section 104(8) of the Constitution states,

"(8) In the performance of its functions or the exercise of its authority and powers, **the Commission is independent and not subject to the direction** or control **of any person** or authority, **except by a court** of law or as otherwise prescribed by written law."(emphasis added)

46. The President must comply with Section 112 of the Constitution when removing a judicial officer or the Solicitor-General. If not the removal can be subjected to judicial review.

47. This Application requires this Court to consider and apply various provisions of the Constitution. The Constitution contains a number of provisions about how it is to be applied and interpreted.

48. Section 1 sets out the values on which the Fijian State is founded. It provides –

"*The Republic of Fiji*

1. The Republic of Fiji is a sovereign democratic State founded on the values of –
   (a) common and equal citizenry and national unity;
   (b) respect for human rights, freedom and the rule of law;
   (c) an independent, impartial, competent and accessible system of justice;
   (d) equality for all and care for the less fortunate based on the values inherent in this section and in the Bill of Rights contained in Chapter 2;
   (e) human dignity, respect for the individual, personal integrity and responsibility, civic involvement and mutual support;
   (f) good governance, including the limitation and separation of powers;
   (g) transparency and accountability; and
   (h) a prudent, efficient and sustainable relationship with nature."

49. Section 2, the Supremacy clause, says –

"*Supremacy of the Constitution*

2.–(1) This Constitution is the supreme law of the State.

(2) Subject to the provisions of this Constitution, any law inconsistent with this Constitution is invalid to the extent of the inconsistency.

(3) This Constitution shall be upheld and respected by all Fijians and the State, including all persons holding public office, and the obligations imposed by this Constitution must be fulfilled.

(4) This Constitution shall be enforced through the courts, to ensure that –
(a) laws and conduct are consistent with this Constitution;
(b) rights and freedoms are protected; and
(c) duties under this Constitution are performed.

(5) ...."

50. Section 3(1), which sets out the interpretation, so far as relevant states –

"*Principles of constitutional interpretation*

3.–(1) Any person interpreting or applying this Constitution must promote the spirit, purpose and objects of this Constitution as a whole, and the values that underlie a democratic society based on human dignity, equality and freedom."

51. Section 6, which applies to enforcement of the Bill of Rights, so far as relevant provides –

"6.–(1) This Chapter binds the legislative, executive and judicial branches of government at all levels, and every person performing the functions of any public office.

(2) The State and every person holding public office must respect, protect, promote and fulfil the rights and freedoms recognised in this Chapter.

(7) Subject to the provisions of this Constitution, laws made, and administrative and judicial actions taken, after the commencement of this Constitution, are subject to the provisions of this Chapter."

52. This application seeks to review termination of employment and decisions taken relating to that under the Constitution .Applicant is not only challenging the termination but also series of decisions, which raises issues of public law as opposed to private law as all the said decisions relate to constitutional provisions that can be dealt in judicial review.

53. The Applicant alleges breaches of constitutional and administrative requirements that applied to the Applicant's suspension from the post he held and also removal from office. The issue is not dependent on whether he was under contract of employment or not.

54. *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee*, (House of Lords) [1992] 1 All ER 705 at 726 held,

> "But the actual or possible absence of a contract is not decisive against Dr Roy. He has in my opinion a bundle of rights which should be regarded as his individual private law rights against the committee, arising from the statute and regulations and including the very important private law right to be paid for the work that he has done."

55. The Applicant was appointed to an office under section 116 of the Constitution, and the issues raised are relating to constitutional provisions relating to decisions taken by constitutional authorities that can be judicially reviewed. The issues are not private law and cannot be dealt under Section 220(1) (h) or (i) of ERA.

Disputed Facts

56. Respondent in the further written submission to the opposition to leave to application of judicial review, had relied on Court of Appeal decision of *R v Home Secretary exp. Zamir* [1980] AC 930 relied in ABU No 68 of 2015 *Kilowen Fiji Ltd v Director of Lands* (17.9.2017). The contention of the Respondent was that this action is not suited for judicial review due to disputed facts.

57. Respondent in the submission had pointed out several disputes as to some facts but in my mind none of them are relevant to this application.

58. *R v Home Secretary exp. Zamir* [1980] AC 930 decision was not followed by House of Lords (UK) in *Khawaja v Secretary of State for the Home Department and another appeal* [1983] 1 All ER 765 where it held,

> 'The third general issue is whether, if your Lordships accept the view that the duty of the courts is not limited to inquiring whether there was evidence on which the immigration officer was entitled to decide as he did, the House should now depart from the train of decisions culminating in *Zamir* to the contrary effect. Any such departure from precedent requires careful consideration because of the undesirability of disturbing settled rules. But **in the present case I am clearly of opinion that the decision in *Zamir*, to which I was a party, was erroneous** in stating that the function of the court was only to see whether there were reasonable grounds for the decision of the immigration officer.'(emphasis added).

59. Accordingly I am not inclined to reject this application seeking juridical review only because some facts are disputed, as contended by Respondents.

60. According to the Respondent the complaint made by Supervisor of Elections and letter from second Respondent and failure to provide ' any proper response to the allegations' cannot be resolved by the court.

61. In a judicial review application court is not going to resolve such allegations and or complaints, but can review decisions taken in violation of procedural requirements, reasonableness or ultra vires. There is no need to consider

facts contained in the said complaints or replies provided in order to review the six decision stated in this application.

62. It is not in dispute that –

(a) Second Respondent advised the President to suspend the Applicant

(b) the President acted on the said advise to suspend the Applicant by letter dated 20.9.2021(SS 2 to Affidavit in support)

(c) The President suspended the Applicant without pay pending an 'appointment of a Tribunal as provided for under section 112 of the Constitution of the Republic of Fiji.'

(d) Applicant through his solicitors wrote to second Respondent on 27.9.2021 requesting full salary during the suspension pending inquiry said tribunal.(Annexed marked SS 3 to the affidavit in support)

(e) On 1 .10. 2021, the second Respondent refused the Applicant's request to advise the President restore the Applicant's pay during suspension (Applicant's Supporting Affidavit, SS-4);

(f) Second Respondent's letter to the Applicant on 4.11.2021, enclosing a complaint by the Supervisor of Elections and required the Applicant's to respond to 31 questions set out in that letter.

(g) The response to be provided by, 06.11.2021(Applicant's Supporting Affidavit, Annexed SS-6);

(h) Applicant through his solicitors requested on 5.11. 2021 for extension of time period to eight days, giving reasons for such a request. (Applicant's Supporting Affidavit, Annexed SS-7);

(i) 5.11. 2021, the above request was declined. (Applicant's Supporting Affidavit, Annexed SS-8);

(j) 6.11. 2021, the Applicant while denying all the allegations, again sought a reasonable time to be able to provide his response. (Applicant's Supporting Affidavit, Annexed SS-9).

(k) On 10.11. 2021, the Applicant was served with a letter signed by the President, which removed the Applicant from office (Applicant's Supporting Affidavit, paragraph 35 and Annexure SS-10.

63. Judicial Review is sought and based on the above undisputed facts and the constitutional provisions not the facts contained in the allegations against Applicant. So there is no merit in the contention that this action is not suitable for judicial review as facts relating to the complaint against Applicant are disputed.

64. In R *v East Berkshire Health Authority, ex p Walsh* [1985] QB 152–165, [1984] 3 All ER 425–431, CA, per Sir John Donaldson MR stated,

'In August 1982 an incident occurred at Wexham Park Hospital involving a patient, Mr Walsh and Miss Cooper, the district nursing officer. The details and the merits of the dispute are a matter of controversy, but happily are irrelevant for present purposes. Suffice it is to say that on or about 25 August 1982 Miss Cooper suspended Mr Walsh from duty.'

65. Similarly, the complaint by Supervisor of Elections and response to that is not the subject matter relevant to this application for this application as constitutional provisions were violated.

66. Respondents in the further submission in the concluding remarks argue that second Respondent's discretion cannot be subject to judicial review. For this relied on the case of *State V Speaker of Parliament* HBJ 04 of 2016. This is clearly a misapplication of law, as said case dealt with the separation of power between internal proceedings of the parliament, and court of law. This has no application for judicial review of a decision of second Respondent.

67. Section 104(8) of the Constitution, specifically states that the actions of the second Respondent are subject to the directions and control of the court. So the said argument to draw parallel between internal proceedings of the parliament and the decisions of the second Respondent is without merit.

68. The Applicant does not seek an order for to make the decision on whether the Applicant be removed from office on the merits of the said complaint by SOE.

69. Applicant is seeking Court to determine whether six Decisions made by Respondents were made in accordance with the Constitution and or ultra vires, and seeking declarations that the six Decisions were unlawful and orders of certiorari to quash them.

70. The Court may remit the matter back under Order 53 rule 9(4) of HCR after hearing, for reconsideration in terms of the decision, hence there is no need to seek such an order in this application. These are issues that may be included if leave for judicial review is granted.

71. Order 53 rule 7 of the HCR empowers the Court to make orders for damages in judicial review and states:

> "7 (1) On an application for judicial review the Court may, subject to paragraph (2), award damages to the applicant if—
>
> (a) he or she has included in the statement in support of his or her application for leave under Rule 3 a claim for damages arising from any matter to which the application relates; and
>
> (b) The Court is satisfied that, if the claim had been made in an action begun by the applicant at the time of making his or her application, he or she could have been awarded damages.
>
> (2) Order 18, Rule 12, shall apply to a statement relating to a claim for damages as it applies to a pleading."

72. In *Rajendra Prasad v Divisional Engineer Northern & Anor.* (Judicial Review No. 3 of 2007, 25.9.2008) High Court, in a judicial review proceeding, awarded general damages and held,

> "Order 53, Rule 7 says that damages can be awarded so long as the Court is satisfied that, 'if the claim had been made in an action begun by the application at the time of making his application, he could have been awarded damages'. The framing of the Rule leads to a view that where loss of job or demotion are in issue, it is proper in considering the question of damages to have regard to unfair or unlawful dismissal, and breach of employment contract cases.
>
> ...
>
> However, what needs to be affirmed in the present case, consistent with *The Permanent Secretary for the Public Service Commission and Anor v. Epeli Lagiloa*, is that having succeeded in his application for certiorari, Mr Prasad succeeds also in his claim for recovery of wages and entitlements. This is because it need not be pleaded as special damages. Rather, the decision having been quashed, Mr Prasad is in a position of having been effectively employed by the First Respondent from the time of the purported dismissal (or suspension as the Respondents say), and hence is entitled to pay.
>
> ...
>
> The Court can make an award of general damages to cover the humiliation and loss of face confronted by Mr Prasad in the termination of his employment, particularly taking into account his lengthy period of service with the Respondents. This is, in my view, exacerbated by the matters to which Counsel refers in the Written Submissions, namely the matters set out in the substantive judgment as to the way in which the Respondents approached the decision-making process and its effect upon Mr Prasad."

73. The Privy Council in *Panday v Judicial and Legal Service Commission* [2008] UKPC 52, dismissed the same objection regarding appropriateness as to the award of damages in judicial review and held,

> "22. Mr Boolell raises as an initial objection to any award, whether of salary or damages, that any such claim should be pursued in separate civil proceedings, in the light of any judgment given by the Board. He referred to *D. Hurnam v. The State of Mauritius* 2003 SCJ 54 Record No. 606, where the Supreme Court took a restrictive view of the claims for compensation that could appropriately be pursued under s.17 of the Constitution, which provides for redress in respect of contraventions of ss.3 to 16 of the Constitution. The present case concerns an application for judicial review based on Chapter VIII of the Constitution. Mr Boolell cited no authority which restricts the scope of relief that may appropriately be granted in this context. Their Lordships consider that it would be unfortunate if, following a successful application for judicial review, a court were unable to award arrears of salary or give consequential redress that was otherwise

arrears of salary or give consequential redress that was otherwise appropriate, but had to remit the matter to be decided in separate civil proceedings before another court. **A court dealing with a judicial review application can either assess the appropriate award itself or can, if factual or other issues require further evidence or argument, order a trial of such issues separately, giving such directions as may be appropriate for the further conduct of the proceedings."** (emphasis added)

74. So the request of damages is not a reason to deny judicial review, as court may grant or refuse such a request.

75. Having dealt the preliminary issues the six decisions are dealt below.

Decision to Suspend (First Decision)

76. The Applicant received his letter of suspension from First Respondent on 20.9. 2021. The letter informed the Applicant that the President received advice from first Respondent.

77. Applicant could, under section 112(4) of the Constitution, be suspended by the President acting on the advice of second Respondent.

78. This is discretionary. Section 16 of the Constitution guarantees every person the right to executive or administrative action that is lawful, rational, proportionate, as well as procedurally fair.

79. Second Respondent had received the complaint from the SOE on 14 .9. 2021. It had allegedly taken a decision to suspend but this decision was not provided by second Respondent in the affidavit in response.

80. It is not clear (as the said decision of second Respondent was not annexed)

    (a) When the decision to suspend was taken by second Respondent.
    (b) Whether suspension was with or without the salary.
    (c) When was the advice not to pay the salary conveyed to the first Respondent.

81. If the decision to suspend was without salary, as alleged in the affidavit in opposition, that is a decision that can be subjected to judicial review considering that deprivation of remuneration without seeking any explanation from Applicant can be subjected to judicial review.

82. The fact that the Applicant had earlier received a copy of the complaint to Prime Minister, was irrelevant, as it was addressed only to the Prime Minister and there was not even an indication that it was copied to second Respondent. The complaints were not identical and Applicant needs reasonable time to act when second Respondent sought explanation.

83. The minutes of the meeting, the decision of the meeting of second Respondent, copies of letters written by second Respondent are not provided to the court. So

84. Further, suspension under section 112(4) of the Constitution is discretionary. Privy Council in *Rees v Crane* [1994] 1 All ER 833 held that preliminary inquiry could be conducted without seeking explanation or following rules of natural justice and this is not a rigid rule. Hence there are arguable grounds to grant leave for judicial review of the decision to suspend Applicant by second Respondent.

85. There are allegations of second Respondent not acting impartially and independently. There are arguable grounds to grant leave for judicial review, of First Decision.

Decision of First Respondent on 20.9.2021(second Decision)

86. Firstly, there is no evidence of any letter or decision of second Respondent advising first Respondent regarding non-payment of salary during suspension.

87. Secondly letter of 20.9.2021 states that suspension of the appointment of Applicant was 'pending the appointment of a Tribunal as provided for under Section 112 of the Constitution of the Republic of Fiji.'

88. There was no Tribunal appointed by second Respondent, before the termination of Applicant.

89. Applicant also argues that the suspension without pay was unconstitutional and unlawful, for a number of reasons –

(a) First, if the first Decision to suspend was unlawful, the suspension without pay decision also unlawful

(b) Second, if the suspension without pay was not taken by second Respondent, first Respondent could not suspend salary without a decision from second Respondent. Neither first Respondent nor second Respondent filed letter advising suspension without pay.

(m) Thirdly, section 112(4) of the Constitution, does not allow for the Applicant's suspension from the position without pay.

(n) The Respondents referred to section 137(4) of the Constitution which allows the President, to exercise discretion regarding terms of suspension but this applies to, suspension of the independent public officers referred to in section 134 of the Constitution and has no application to Applicant.

(o) fourthly, section 116(8) of the Constitution (which is identical to section 113(1) of the Constitution) expressly states that remuneration payable to the Applicant must not be varied to his disadvantage, except as part of an overall austerity reduction applicable to all officer of the State. The removal of the Applicant's pay was a fundamental variation in remuneration and in breach of section 116(8);

(p) Fifthly, suspension without pay invariably results in financial hardship, and as such, the Applicant should have been given an opportunity to be heard on the complaint and any proposed suspension before the Applicant was suspended. The Applicant was denied fairness and natural justice, as enshrined in section 16 of the Constitution and as firmly established in administrative law;

(q) Sixthly, suspension without pay creates serious financial implications which has the effect of punishing the person suspended who has not been provided with an opportunity to be heard on the complaint made against that person. This is disproportionate and contrary to fundamental principle of innocence;

(r) Seventhly, the decision was contrary to general procedure of second Respondent, hence acted unreasonably.

90. It is suffice to state at this stage that Applicant had raised arguable grounds for judicial review of the decision conveyed to him on 20.9.2021.

91. Section 112(4) of the Constitution as well as section 82 of the Constitution requires first Respondent, only act on advice, in the absence of evidence of such fact , the decision to suspend without salary , would be contrary to the Constitution, so there are arguable issues relating to second decision to grant leave for judicial review.

Refusal to restore salary pending investigation by a Tribunal conveyed on 1.10.2021(Third Decision)

92. The Applicant has showed that there is an arguable case for a judicial review of this decision on the same grounds applicable to above as this refer to a decision taken by request of Applicant to re consider payment of his salary during the pendency of suspension.

Decision conveyed on 4.11.2021, to seek response within two days (Forth Decision)

93. On 4.11.2021, Applicant was handed a letter of second Respondent seeking specific responses relating to thirty one queries by 6.11.2021. This letter for the first time had annexed the SOE's complaint to the Chairman of second Respondent dated 14.9.2021.

94. It should be noted that the complaint of SOE to second Respondent relates to the same incident which SOE had earlier complained to Prime Minister, but the contents are not identical. Hence arguing that Applicant had in possession a complaint made to Prime Minister by SOE cannot be a reason to deny a reasonable time period to reply to the specific queries sought.

95. It should be noted that paragraph 6 of letter of 4.11.2021 specifically stated that 'before setting up of a Tribunal,' applicant was given the opportunity to seek

explanation. This indicate paramount importance of the response to said letter. This is quite contrast to explanation given to Prime Minister.

96. Applicant was under legal advice at that time and, he cannot act on his own. He needed to consult his chosen legal practitioner hence a reasonable time period is required for all these. Applicant had raised additional issues such as service of the said letter on public holiday and lack of access to some material to reply, as he was suspended.

97. So, there are arguable grounds to seek judicial review as to reasonableness of the time period given in the said letter which sought detailed questions to specific facts. It is believed that complaint was received on 14.9.2021 and no explanation was sought for more than fifty days by second Respondent, but on 4.11.2021 two days given to Applicant to respond to more than thirty one specific questions.

98. On 5.11.2021, the Applicant through his solicitors, responded to the Secretary of second Respondent. They highlighted that the time given to the Applicant to provide his response was unreasonable and offered to respond in eight working days but at about 6.46pm on 5.11. 2021, the request for extension was refused.

99. 6 .11. 2021, the Applicant through his solicitors responded to said refusal and *inter alia* denied all or any allegations of misbehaviour.

Advice of second Respondent to terminate Applicant (Fifth Decision)

100. On 10 .11. 2021, the Applicant was served with a letter from first Respondent. This terminated the Applicant's appointment. This letter stated that, following the advice of the second Respondent, the first Respondent , was in agreement that the allegations contained in the complaint against the Applicant was of a factual nature and did not warrant an investigation through the appointment of a Tribunal.

101. This is contrary to first Respondent's letter of 20.9.2021 where suspension of applicant was done 'pending an appointment of Tribunal 'under the Constitution.

102. First Respondent further stated that

"Having received the advice of the Commission and having considered the complaint, **I find that you failed to discharge** your responsibilities under Section 116(2) of the Fijian Constitution in respect of the matters laid out in the complaint. Further, your conduct, including that which is referred to in paragraph 4 herein, when considered in its entirely, is tantamount to cumulative misbehaviour.'(Emphasis added)

103. Sections 116(9) and (10) of the Constitution states, that the Solicitor-General can only be removed from office for inability or for misbehaviour.

104. Section 82 requires first Respondent, to act only on the advice of the Cabinet or the person or body authorised to advice.

104. Section 82 requires first Respondent, to act only on the advice of the Cabinet or the person or body authorised to advice.

105. Plaintiff argue that second Respondent cannot investigate Applicant's misbehaviour complained and advise first Respondent to remove the Applicant from his post.

106. The Respondents have stated that section 104(2) of the Constitution empowered second Respondent to investigate 'judicial officers', hence can investigate Applicant whose removal was the 'same as judicial officer under Section 112' of the Constitution.

107. Even if above argument is accepted, it does not grant first Respondent to make determinations as stated in the letter of termination dated 10.11.2021. So there are arguable grounds for judicial review of said decision of termination.

108. Applicant contend that section 104(2) of the Constitution, gives the Second Respondent the authority to investigate complaints about judicial officers, but it does not apply to their removal, or termination of a post. Further contend that it applies to any action other than removal.

109. This is a provision that needs to be interpreted at hearing. It is suffice to state it is arguable as said provision needs to reconcile with Section 112 of the Constitution which secures the tenure of judicial officer from arbitrary termination.

Termination by first Respondent (sixth decision)

110. The Termination Decision, which is contained in the letter from the President to the Applicant on 10 .11. 2021, states the following material facts –

(a) in accordance with section 116(9) and 112 of the Fijian Constitution and following the advice of the Second Respondent, the President was "in agreement" that the allegations contained in the complaint against the Applicant were of a factual nature and did not warrant an investigation through the appointment of a tribunal;

(b) the Applicant was given a copy of the complaint and invited to provide his response to specific questions and allegations contained in the complaint of SOE;

(c) having received the Applicant's request for further time, the Second Respondent had declined to give the Applicant further time and had *"encouraged"* him to respond within the time given but he had *"again"* failed to provide his response;

(d) in the circumstances, the Applicant had failed to provide "any material whatsoever to refute and respond to the allegations made in the complaint, and thus left the Commission with no material to put before" the First Respondent, for his consideration in respect of the Applicant's response and "that tantamount to cumulative misbehaviour."

respect of the matters laid out in the complaint, and that his conduct *"tantamount to cumulative misbehaviour."*

(f) First Respondent then terminated the Applicant's appointment as the Solicitor-General for misbehaviour, purportedly in accordance with section 116(9) of the Constitution.

111. As stated earlier, if the second Defendant cannot investigate Applicant termination becomes unlawful.

112. The letter of 10.11.2021 which terminated Applicant, contained statements, that the first Respondent had made a number of determinations himself. These were dealt previously.

113. Applicant argue that Section 112 of the Constitution, does not authorise first Respondent to act in his own judgment. There are arguable grounds to grant leave to judicial review.

Is President a necessary party?

114. In their submissions, the Respondents argued that that the First Respondent, should be removed as a party to the Application. Neither First Respondent nor second Respondent provided any letter advising suspension of Applicant without salary.

115. Applicant argues that there was no decision of second Respondent to advise first Respondent prior to letter of suspension dated 20.9.2021 issued by first Respondent.

116. Apart from that Applicant had raised issues as to content of letter of termination dated 10.11.2021 where first Respondent had stated he had terminated Applicant

'Having considered the complaint, I find that you failed to discharge your responsibilities under Section 116(2) of the Fijian Constitution in respect of the matters laid out in the complaint. Further, your conduct including that which is referred to in paragraph 4 herein, when considered in its entirety, is tantamount to cumulative misbehaviour'

117. So there are issues as to and whether first Respondent had exercised discretion as regards to suspension without salary and also termination. This is not clear as Respondents had failed to submit any advice letter of first Respondent and or decision taken in regard to advice by second Respondent.

118. In *Rees v Crane* [1994] 1 All ER 833 , a senior Judge of the High Court of Trinidad and Tobago brought judicial review to challenge his suspension and referral to the President for the question of his removal to be investigated .

119. In *Attorney-General of Trinidad and Tobago v Ayers-Caesar* [2019] UKPC 44 (decided 9.12.2019), 'the president of Trinidad and Tobago, was sued in the name of the Attorney General of Trinidad and Tobago'. The appeal concerned

the question whether leave to bring judicial review proceeding against the President should have been granted by the courts.

120. In that case there was a declaration sought regarding her claim and court held that claimant and the relevant person should be a party to judicial review.

121. At this stage there is no evidence of a letter or decision, that second Respondent had advised to suspend the Applicant without pay to first Respondent. Hence, first Respondent is a relevant person who is a relevant party to the action at this stage.

122. Considering the circumstances of this case I would not struck off first Respondent from this action and consider first Respondent a necessary party to this action.

CONCLUSION

Applicant has shown that it has an arguable case with respect to all six Decisions which are dealt previously. First Respondent on 20.9.2021 had suspended Applicant. He had also informed that suspension was without out salary 'pending the appointment of a Tribunal as provided under Section 112 of the Constitution of the Republic of Fiji'. Section 112(3) of the Constitution grants discretion to appoint a Tribunal to investigate any complaint, and Applicant was informed on 20.9.2021 that his suspension was pending an appointment of such Tribunal. This was not appointed. Apart from that there is lack of evidence as to advice received regarding non-payment of the salary during suspension. Applicant was granted only two days on 4.11.2021, to reply to more than thirty one specific questions regarding the complaint of SOE to Chairman of second Respondent dated 14.9.2021. SOE's complaint was not given to Applicant before 4.11.2021 and any complaint to any other body or person regarding same incident is not a reason to deny reasonable time period to reply considering importance of such a reply that can affect Applicant's rights. So he is entitled to time period that would allow him to access to legal advice and material required to reply adequately. As established in *Inland Revenue Commission v National Federation of Self Employed and Small Businesses Ltd* [1982] AC 617, *Fiji Airline Pilots Association v Permanent Secretary for Labour and Industrial Relations* (Civil Appeal No. ABU59u of 1997s, 27 February 1998), and *Matalulu v Director of Public Prosecutions* [2003] FLR 129 the Applicant only needs to establish an arguable case at this stage and this threshold was met regarding all six decisions.

Applicant is granted leave to apply for judicial review regarding six decisions which were discussed in this decision. Application for stay is refused considering circumstances and nature of the case. Applicant was suspended from his position on 20.9.2021 but this application seeking judicial review was filed on 16.12.2021. So, this is also a factor taken in to consideration of refusal to consider grant of leave to act as stay of the said decisions.

Final Orders

a. Leave to apply for judicial review is granted for following decisions.

   i. The decision of second respondent, to advise first Respondent to suspend Applicant from office.

   ii. The decision of first Respondent of 20.9.2021 acting upon the advice of second Respondent to suspend Applicant from office without pay.

   iii. The refusal of second Respondent to advise first respondent, to reinstate the salary. (This was based on a communication dated 01.10.2021 by solicitors of second Respondent).

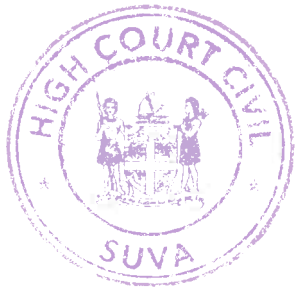
   iv. The decision of second Defendant, on or about 04.11.2021 to demand explanation inter alia for more than thirty one queries, within two days.

   v. Decision was made on or about 10.11.2021 to advise first Respondent to terminate Applicant

   vi. Decision of first Respondent to terminate Applicant from his office made on 10.11.2021.

b. Application to stay is refused.

c. Cost of this application is summarily assessed at $5,000 to be paid by Respondents within 21 days.



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Justice Deepthi Amaratunga
Judge High Court, Suva

Dated at Suva this 26th day of January 2023.