

## STATE

v.

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## THE DIRECTOR OF SOCIAL WELFARE

ex parte :

ANA RAMOCI DELANA

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[HIGH COURT, 1999 (Shameem J) 11 August]

Revisional Jurisdiction

*Public Service- appointments and promotions- how constitutional criteria are to be applied- Constitution (1997) Section 140.*

C The Applicant complained that the Director of Social Welfare had miscarried his discretion when he rejected her application for promotion. The High Court found against the Applicant and HELD: that in balancing the considerations set out in Section 140 of the Constitution the appointing body had to be given a wide discretion, fettered only by considerations of reasonableness.

D Cases cited:

*Anuradha Charan v. Public Service Commission & Ors* Civ. App. 2/92  
(FCA Repts 93/661)

*R.W. (an infant)* [1971] AC 682

*Westminster Corporation v. L&NW Railway* [1905] AC 426

E Motion for judicial review in the High Court.

*I. V. Tuberi* for the Applicant

*E. Walker* for the Respondent

**Shameem J:**

F On 28<sup>th</sup> May 1999 an Application for Leave to apply for Judicial Review of the decision of the Director of Social Welfare to promote one Narendra Prasad to Assistant Director (Operations) Social Welfare on 9<sup>th</sup> April 1999, was filed in the High Court pursuant to Order 53 Rule 3(2) of the High Court Rules 1988.

The following relief was sought:

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- (a) An order of certiorari to quash the decision.
- (b) An order of mandamus compelling the Director to appoint the Applicant as Assistant Director.
- (c) Alternative to (b), mandamus to compel, the Director Social Welfare to readvertise the post and that the provisions of Section 140(b) of the Constitution (Amendment) Act 1997

be complied with on selection.

The grounds upon which relief is sought is

- (a) The Respondent acted ultra vires the Constitution when he appointed Narendra Prasad as Assistant Director when the Applicant was better qualified. A
- (b) The decision of the Respondent to appoint Narendra Prasad was unreasonable. B
- (c) The Respondent had failed to appoint on merit and was in breach of the Applicant's legitimate expectations.

The Application was supported by the affidavit of Ana Ramoci Delana.

On 11<sup>th</sup> June 1999, Counsel for the Respondent, Mr E. Walker agreed that leave should be granted. Leave was granted, and the matter set for hearing for 29<sup>th</sup> July 1999. C

The court had before it, the affidavit of Ana Ramoci Delana filed on 28<sup>th</sup> May 1999, the affidavit of Aseri Rika, Director of Social Welfare, filed on 10<sup>th</sup> June 1999, and an affidavit in response of Ana Ramoci Delana filed on 21<sup>st</sup> June 1999. D

In addition, counsel for the Applicant Mr V. Tuberi and counsel for the Respondent Mr E. Walker made both written and oral submissions.

The facts of the case are simple. The post of Assistant Director (Operations) was advertised on 28<sup>th</sup> February 1999 in the Public Service Circular. The advertisement reads as follows: E

"POST

ASSISTANT DIRECTOR (OPERATIONS)

DUTIES

*Advise on Policy matters to the Director Consultancy, professional advice to the staff. Initiation of programmes relating to field and institutional services. Supervision of Senior Welfare Officers, Welfare Officers, Non-Government organisations and others seeking assistance. Advise and process all overseas applications for adopting Fiji children. Attend meetings, give lectures to different organisations, both government and non-government.* F

QUALIFICATIONS

*An officer of high calibre. Qualifications required for appointment as Senior Welfare Officer and at least 3 years service in that grade or* G

A *equivalent. Consistency good reports and ability to manage staff and resources. Must have demonstrated intellectual capacity, drive, determination and flair in existing grade.*

SALARY: ADO1 : \$29,408 - \$32,849"

B There were five applicants for the job. Four were qualified and were interviewed by the Social Welfare Department Staff Board, which was chaired by the Permanent Secretary for Justice, and comprised of three other members.

B The Staff Board interviewed the four qualified applicants and assessed each on the basis of the interviews and their Annual Confidential Report ratings.

The Applicant was rated the highest at 220 marks, whilst Mr Narendra Prasad was rated second at 211 marks.

C The Staff Board then recommended that "Mrs Delana has acquired the necessary requisite experience for this post and has been exposed in performing the duties of the post. She is also the most senior officer in the Senior Welfare Officer grade."

The Applicant was then recommended for promotion to the post.

D The recommendation of the Staff Board was not accepted by the Head of Department, Aseri Rika. At Annexure B to his affidavit, Mr Rika minuted as follows on the 15<sup>th</sup> of April 1999.

E "I have taken into consideration the recommendation of the Staff Board and in view of the very close ratings of Mrs A. Delana and Mr N. Prasad I have decided to consider Mr Prasad for promotion to the post of Assistant Director Operations.

My further justifications are as below:

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1. The need to appoint an Indian officer in view of the inbalanced ethnic representation in the Department.
  2. Mrs Delana has failed to prove her capabilities and potential whilst in the acting capacity. She did not maintain a cordial relationship with the subordinate staff.
  3. The Acting Appointment was given to Mrs Delana due to her proximity to the vacant post to avoid any unnecessary movement of her staff.
  4. The appointee to this position should be able to work in close consultation with the Director and be able to implement all decisions promptly and effectively."
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The application to review the decision, is in effect, an application to review the

decisions of the Director to reject the recommendation of the Staff Board and to appoint Mr Narendra Prasad to the post.

In his submissions, Mr V. Tuberi for the Applicant submitted that the delegation of the powers of appointment by the Public Service Commission to Heads of Department was repealed by the Constitution Amendment Act 1997, that the Director had failed to appoint on merit as he was obliged to under Section 140(a) of the Constitution, and that he had disregarded Section 140(b) of the Constitution which provided that men and women should have adequate and equal opportunities for training and advancement. He submitted that the Applicant was clearly the most qualified of the applicants as she held a Diploma in Community Development, and a Bachelor of Arts Degree in Management and Sociology. In comparison, Mr Narendra Prasad held a Diploma in Community Development. He argued that the decision to appoint Mr Prasad was therefore an unreasonable one. He further argued that the need to achieve racial balance in the public service was an irrelevant consideration and that the Applicant had a legitimate expectation that the Director would honour the selection process through the Staff Board. He argued finally that it was unreasonable of the Director to override the decision of the Staff Board when it was chaired by his superior, the Permanent Secretary for Justice.

In response, Mr E. Walker submitted that the delegation of powers of appointment was saved by Section 195(2)(i) of the Constitution (1997). He submitted that the Staff Board was merely an internal body set up by Departments to advise the Head of Department on staff matters.

Mr Walker submitted that since the Staff Board had no legal status, the only issue was whether the Head of Department had acted reasonably in rejecting the recommendation to promote the Applicant.

He argued that Section 140(a)(b)(c) and (d) of the 1997 Constitution should be construed to hold that whilst merit was paramount, the appointing authority should also consider ethnic balance. Mr Walker argued that gender, in comparison, was of limited relevance in appointments.

As such, he argued that the Director had acted reasonably in exercise the power delegated to him particularly given the closing rating in the interview results of both applicants. He submitted finally that since the Applicant's acting appointment, nor the recommendations of the Staff Board, are automatically followed by appointment, she could not have a legitimate expectation to be appointed. Mr Walker asked for the application to be dismissed.

### Appointment

I turn firstly to the question of whether the Director of Social Welfare has powers to appoint to the post of Assistant Director.

Legal Notice No. 138 of 1997 delegated to the Director of Social Welfare, powers given to the Public Service Commission under Section 127 of the 1990

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Constitution, to make appointments, to promote, to transfer and to discipline in respect of all occupational groups.

A Section 195(2)(i) of the 1997 Constitution provides:

“Despite the repeal of the Constitution . . . . 1990:

(1) all delegations that:

- B (i) had been given before that repeal by a commission or person referred to in the Constitution of 1990; and  
(ii) were in force immediately before that repeal;

continue in force, on and after that repeal, as if given by the corresponding commission or person referred to in this constitution.”

C Legal Notice No. 138 of 1997 states as follows;

“Pursuant to the provisions of subsection (3) of Section 127 of the Constitution and Section 6 of the Public Service Decree 1990, the Public Service Commission (“Commission”) hereby delegates, subject to the provisions of the Constitution, to Permanent Secretaries and Heads of Departments listed in Schedule “A” hereunder, the Commission’s powers to:-

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- (a) make appointments (including power to confirm appointments and to make probationary and acting appointments), promotions . . . . . in respect of all occupational groups.”

E I am of the view that this delegation to the Heads of Department specified in Schedule 2 of the Notice which includes the Director of Social Welfare is saved from repeal, by Section 195(2)(i) of the 1997 Constitution.

As such, the Respondent had the power to appoint to the post which is in issue in this application.

F Ultra Vires and Unreasonableness

Whilst the Respondent, in my view had powers to appoint and promote, he was obliged to exercise the powers reasonably, in good faith and on correct grounds. The process of judicial review is about a review of the decision-making process. It cannot be concerned with the merits of the decision itself.

G As Lord McNaughten said in Westminster Corporation -v- L & NW Railway [1905] AC 426 at 430 -

“It is well settled that a public body invested with statutory powers such as those conferred upon the corporation must take care not to exceed or abuse its powers. It must keep within the limits of the

authority committed to it. It must act in good faith. And it must act reasonably. The last proposition is involved in the second, if not in the first.”

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The Applicant say firstly that the Respondent was obliged to take into account the relevant considerations provided under Section 140 of the Constitution (1997).

That section provides;

“The recruitment of persons to a state service, the promotion of persons within a state service and the management of a state service must be based on the following principles:

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(a) government policies should be carried out effectively and efficiently and with due economy;

(b) appointments and promotions should be on the basis of merit;

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(c) men and women equally, and the members of all ethnic groups should have adequate and equal opportunities for training and advancement;

(d) the composition of the state service at all levels should reflect as closely as possible the ethnic composition of the population, taking account, when appropriate of occupational preferences.”

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Section 140 of the Constitution provides that in appointments and promotions, merit is relevant, ethnic composition of the institution is relevant, efficiency, effectiveness, and economy are relevant, and finally, gender is relevant.

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At paragraph 10 of his affidavit Aseri Rika, Director Social Welfare explained his decision as follows:

“As advertised the Assistant Director (Operations) in the Department of Social Welfare must work closely with me as Director advising on policy matters and the management of staff within the Department in addition to other assigned duties. I verily believe that as Director I am able to promote the individual I think is best suited for the position provided the promotion is on line with the current appointment and promotion policies.”

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The qualifications relevant to the post were specified in the advertisement, already set out in this judgment. In particular the advertisement required a person with “consistently good reports and ability to manage staff and resources. Must have demonstrated intellectual capacity, drive, determination and flair in existing grade.”

These criteria in addition to the requirement set out in Section 140 of the

Constitution are the relevant considerations to be taken into account for appointment to the post.

- A In his minute of 1<sup>st</sup> April 1999, the Director took into account ethnic representation, the Applicant's ability to maintain a cordial relationship with the staff her ability to consult with the Director, and to implement decisions promptly and effectively.

It is difficult to see how the Director erred in the exercise of this discretion.

- B Mr Tuberi for the Applicant submits that the Respondent failed to give weight to the fact that she is a woman. In her affidavit, the Applicant at paragraph 15 deposes that;

“ . . . it appears to me that the regime in the Department of Social Welfare was to establish a male oriented management team....”

- C However there is no evidence before me that in rejecting the Staff Board recommendation the Respondent was in any way influenced by the Applicant's gender. In the balancing of the considerations set out in Section 140 of the Constitution, the appointing body must be deemed to be given a wide discretion.

- D The balancing of the Section 140 criteria is inevitably complicated when an appointing authority is faced with applicants who are men and women, and who are of many races. What weight should be put on race, and what weight on giving men and women equal opportunities of advancement?

- E In the balancing of these considerations the appointing authority must have a wide discretion fettered only by considerations of reasonableness. Whether another person may have decided to give greater weight to gender issues is irrelevant. As Lord Hailsham LC said in R.W. (An Infant) [1971] AC 682 at 700, two reasonable persons can perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting their title to be considered reasonable.

- F In Anuradha Charan -v- Public Service Commission & Others Civil Appeal No. 2 of 1992, (FCA Repts 93/661) the Applicant had applied to review the decision of the Commission to promote other candidates over the Applicant. She had claimed that she was better qualified for the posts concerned.

The High Court had refused the application. On appeal, the Court of Appeal said:-

- G “Clearly the Commission must observe the proper rules and procedures in seeking and considering applications for vacancies. In so doing they must evaluate evidence of all aspects of the candidates' abilities, qualifications and attitudes. Having done so, they are left with a discretion to decide the suitability of the candidate for the post under consideration. That discretion must include the right to decide, if based on proper grounds, that despite fulfilling all

the stated qualifications, the candidate may still not be suitable. There may be many reasons why a particular person should not be appointed despite suitable qualifications on paper and there is no right of automatic appointment in the event that no other qualified person applies.”

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In the circumstances I can find no evidence on the material before me, that the Respondent acted unreasonably or that he took into account irrelevant considerations, or that he failed to take into account relevant matters.

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Nor can I accept Mr Tuberi's argument that the Respondent was unreasonable in overriding the decision of his superior, the Permanent Secretary for Justice. It was agreed by counsel that the Staff Board had no legal status and was merely an internal consultative mechanism to assist the Head of Department in whom the power to appoint vests. This is also apparent from the report of the Board. As such, it seems very unusual that the Board should be chaired by a person outside of the Department.

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However, no evidence was provided to the court to explain the choice of chair of the Board. As such, I can only conclude that in chairing a body subject to being overruled by the Director, the Permanent Secretary accepted such a subordinate role.

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I cannot agree that the Respondent is always obliged to agree with the Staff Board simply because it is chaired by a Permanent Secretary. To accept that proposition would be to frustrate the advisory role the Board itself appears to have, as reflected in the report at Annexure "A" of the affidavit of Aseri Rika.

Nor can I agree that the Applicant had legitimate expectations that were breached.

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The advertisement for the post clearly set out the criteria relevant to the appointment. It was on the basis of that criteria, and considerations of Section 140 of the Constitution that another person was appointed.

In the circumstances and for the reasons set out in the judgment, I am not satisfied that the Respondent acted *ultra vires* and unreasonably in the exercise of his discretion to appoint Mr Narendra Prasad.

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I dismiss the application accordingly and order costs against the Applicant to be paid to the Respondent to be taxed if not agreed.

*(Motion dismissed.)*

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