

**NEW INDIA ASSURANCE COM LTD v PERMANENT SECRETARY OF  
LABOUR, INDUSTRIAL RELATIONS, TOURISM AND  
ENVIRONMENT, FIJI BANK AND FINANCE SECTOR EMPLOYEES  
UNION AND RAMAN (CBV0002 of 2010S)**

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SUPREME COURT — CIVIL JURISDICTION

MARSOOF, HETTIGE and WATI JJ

10 12, 24 October 2012

**Courts and judicial system — appeal — special leave to appeal — whether special  
leave to appeal should be granted — whether far reaching question of law on matter  
of great general public importance raised — Administration of Justice Decree  
ss 8(2)(b), 8(3) — Constitution ss 33, 38 — Employment Relations Promulgation  
s 265 — Supreme Court Act s 7(3) — Trade Disputes Act ss 2, 3, 4(1)(a), 5(a)(2).**

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The first respondent (the Permanent Secretary of Labour, Industrial Relations, Tourism  
and Environment) decided to constitute a dispute committee pursuant to the Trade  
Disputes Act 1978 in relation to a complaint of age discrimination made by the third  
respondent (the employee). The petitioner (the employer) applied to the High Court of Fiji  
for judicial review of that decision. That application was dismissed on the basis that the  
application was premature. An appeal to the Court of Appeal of Fiji was dismissed. The  
petitioner sought special leave to appeal to the Supreme Court of Fiji.

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Section 7 (3) of the[[@fffd](#)]Supreme Court Act 1988 relevantly provided as follows:

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‘..... in relation to a civil matter (including a matter involving a constitutional  
question) the Supreme Court must not grant Special Leave to Appeal unless the case  
raises.

a. A far reaching question of law

b. A matter of great general public importance;

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c. A matter that is otherwise of substantial general interest to the administration of  
civil justice.’

**Held –**

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There was no far reaching question of law of great general public importance to be  
determined in accordance with s 7(3) of the *Supreme Court Act*. The lower courts’  
consideration of the issues raised on the application for leave to appeal were correct and  
the relevant legislation has since been repealed.

Leave to appeal refused.

**Cases referred to**

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*Chief Constable of the North Wales Police v Evans* [1982] 1 WLR 1155; *Council  
of Civil Service Unions v Minister for Civil Service (CCSU/GCHQ/Government  
Communications Headquarters)* [1985] AC 374, considered.

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*Dr Gasnesh Chand v Fiji Times Ltd* FJSC CBV0005 of 2011; *Fereti Seru Dewa v  
University of South Pacific* [1996] FJHC 125; HBJ0007J 1994s (4 July 1996); *Fiji  
Human Rights Commission v Suva City Council* (Unreported, High Court of Fiji at  
Suva Civil File No HBC0073.2004 17 November 2006 Coventry J) (PacLII: [2006]  
FJHC 44.; *Penioni Bulu v Housing Authority* 2005 FJSC 1 CBV0052 of 2003S,  
followed.

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*H. Nagin* for the Appellant.

*N. Karan* for the first Respondent.

*R Singh* for the second and third Respondents

5 [1] **Marsoof JA.** I had the benefit of reading both the judgments of Hettige JA and Madam Wati JA in draft and agree with the reasoning and conclusions of these judgments, and that special leave to appeal should be refused with costs.

10 [2] **Hettige JA.** This is a Special Leave to Appeal application against the decision of the Court of Appeal delivered on 27th January 2010. The Court of Appeal dismissed the petitioner's appeal which was filed against the decision of High Court of Suva dismissing the petitioner's application for judicial review on 8th October 2008.

### RELIEF SOUGHT IN THE HIGH COURT

15 [3] In the High Court Judicial Review application the petitioner was seeking inter alia, the following reliefs:

(a) An Order of Certiorari to quash the decision of the First Respondent made on or about 11th July 2007.

20 (b) A Declaration (in any event) that the First Respondent had abused the discretion and/acted arbitrarily and or unreasonably and/or acted in breach of the petitioner's legitimate expectations and/or exceeded his jurisdiction and/or made errors of law in purporting to accept the trade dispute on 11th July 2007.

(c) A declaration that the First Respondent's decision dated 11th July 2007 was unlawful, invalid, void and of no effect

25 (d) Stay of the First Respondent's decision dated 11th July 2007 pending final determination of the judicial review.

[4] The learned High Court Judge held that the petitioner's application for leave to appeal for judicial review was premature. Instead, the matter should have been allowed to run its course before the Disputes Committee. The petitioner's judicial review application was dismissed with costs.

30 [5] The petitioner filed an appeal against the dismissal of the Judicial Review application in the Fiji Court of Appeal on 31st October 2008 on 15 grounds of appeal and the Court of Appeal dismissed the appeal and awarded costs in a sum of \$4000.00 against the petitioner.

35 [6] The petitioner has filed the present Special Leave to Appeal application against the decision of the Court of Appeal dismissing the appeal dated 27 January 2010, based several grounds of Appeal.

40 [7] Even though the petitioner has raised several grounds of appeal, the learned counsel for the petitioner confined himself to the central issue of law being the issue of "Trade Dispute" accepted by the First Respondent in relation to the Third Respondent's age of retirement involved in this application for Leave to appeal and parties also agreed that the case be heard on merits as well.

45 [8] At the outset of the hearing of this application parties also agreed that the Collective Agreement has no application to the Third Respondent as the 3rd respondent who was the assistant manager was excluded from the applicability of the Collective Agreement entered into between the petitioner and the Second Respondent Union.

50 [9] Even though the parties were at a consensus that the Third Respondent was a member of the Second Respondent Union, the learned Counsel for the petitioner submitted in reply to a question made by Court that there is no Contract of Service signed between the petitioner and the Third respondent.

**BRIEF OUTLINE OF FACTS**

[10] The Third Respondent was an employee attached to the Management Staff as an Assistant Manager of the Petitioner Company. The petitioner and the Second respondent entered into a Collective Agreement on 11th July 2000. The  
5 Collective Agreement was subsequently registered with First respondent, the Permanent Secretary of Labour, Industrial Relations, Tourism and Environment on 31st July 2000.

[11] Clause 14 of the Collective Agreement provided that

10 *“The employer may at its discretion retire its employees from service upon their reaching fifty-five (55) years of age”*

The petitioner, company without any reference to Clause 14 of the agreement informed

15 Ms Sulochana Raman, the 3rd respondent by a letter dated 1st June 2007 that she would be relieved from the services upon her reaching 55 years of age. The wordings of the said letter were as follows:

*“We note from records that you are attaining the age of superannuation on 9 June 2007.*

20 *We appreciate your long standing services to our company and advise you that you will be relieved from services of the company on 8 June 2007 at the close of the office hours.”*

[12] By the letter dated 4th June 2007 the Second Respondent having received Instructions from Mrs Raman, the 3rd respondent, she had advised the petitioner that she does not wish to retire but to continue being employed in her current  
25 position and it was brought to the notice of the petitioner the Judgment of the *Fiji Human Rights Commission v Suva City Council* (Unreported, High Court of Fiji at Suva Civil File No.HBC0073.2004 17 November 2006 Coventry J) (PacLII: [2006] FJHC44.

30 Wherein that it was held that any decision to compulsorily retire any employee on the ground of age would constitute discrimination and offend the Constitution of Fiji.

[13] By a letter dated 7th June 2007 the Petitioner company informed the Second Respondent Union reconfirming the decision as already communicated to Mrs Sulochana Raman.

35 [14] The Second Respondent on 7th June 2007 informed the First Respondent that pursuant to s 3 of the Trade Disputes Act 1978 as amended that they wished to advise as to the existence of a Trade Dispute over the matter.

[15] The First Respondent by the letter dated 11th June 2007 informed the petitioner advising that:

40 *“The Fiji Bank Finance Sector Employees Union has reported a trade dispute against New India Assurance Company Ltd. AS the employer in this regard we await your response, within next three days, on whether or not you have been served with a copy of the report of trade dispute, as required under sub-section 3 of s 3 of the Trade Disputes Act. Cap 97”*

45 [16] The petitioner failed to reply to the said letter dated 11th June 2007 and on 11th July 2007 The First Respondent, with copy to the petitioner, informed the Second respondent that he had accepted the report of a Trade Dispute in accordance with s 4(1)(a) of the Trades Disputes Act as follows:

50 *“I refer to your letter dated 7th June 2007 reporting the existence of a trade dispute between your union and New India Assurance Company Ltd. I note that the dispute is over the termination of employment of Mrs Sulochana Raman with effect from 8 June*

2007. Your Union views the company's action as unfair, unjust and unreasonable and constitutes discrimination on the grounds of age and therefore seeks her re-statement without loss of pay and benefits from the date of termination.

5 In terms of s 4(1)(a) of the Trade Disputes Act Cap 97 I have accepted the report of the trade dispute and in terms of paragraph (h) of the said section refer the Dispute to a Dispute Committee. The Dispute Committee will be constituted by me under s 5A (2) of the said Act, for a decision.

10 You are now requested in terms of s 5A(2)(b) of the said Act to recommend an independent person to be appointed to represent your union in the Committee. By a copy of this letter, New India Assurance Company Ltd is also being requested in accordance with s 5A(2)(c) of the above-mentioned Act to recommend an independent person to represent the employer in the Committee.

The person so nominated should be available to hear the dispute and make a decision within 14 days from the date of appointment.

15 Please note that the Act requires that recommendation be with me within 14 days from the date of this letter.”

[17] The petitioner's Solicitors informed the First Respondent by the letter dated that advising that the their client was of the view that the acceptance of the trade dispute was not in accordance with the law and accordingly was seeking to challenge the decision by way of a judicial review.

20 [18] After full hearing of the matter the High Court dismissed the application for judicial review on the basis that the application for judicial review was premature and in appeal to the Court of Appeal against the said decision of the High Court, the Court of Appeal dismissed the appeal with costs awarded in favor of the 2nd and 3rd respondents.

25 [19] The main contention of the petitioner was that the Permanent Secretary was required to consider the nature of the Second respondent's report first before accepting it as a "Trade Dispute" and the First respondent did not properly exercise his discretion and failed to give reasons as to why he accepted it as a Trade Dispute.

30 [20] The petitioner's application for judicial review was one seeking public law remedy which was a discretionary relief sought from the High Court on the basis that the First Respondent abused his discretion exceeding his jurisdiction and acted *ultra vires* and in breach of the petitioner's legitimate expectations when he exercised the statutory powers vested in him under s 4 of the Trade Disputes Act  
35 by accepting the report of a Trade Dispute dated 11th July 2007.

#### ISSUE OF TRADE DISPUTE

40 [21] Section 2 of the Trade Disputes Act of 1978 as amended by the Amendment Act of 1998 defines the word "Trade Dispute" as follows:

"trade dispute" means any dispute or difference-

(a) Between any employer and a registered trade union recognized under the Trade Unions (Recognition) Act (Cap 96 A) and connected with the employment or with the terms of employment or the conditions of labour of any employee;

45 (b) Between an employer and a registered trade union that has applied for recognition under the Trade Unions (Recognition) Act and connected with the termination of employment of that employee during the time when the application for recognition of the trade union is being processed; or

50 (c) Between an employer and an employee who is a member of a registered trade union that has applied or recognition under the Trade Unions(Recognition) Act and connected with the termination of employment of that employee during the time when the application for recognition of the trade union is being processed; (emphasis added)

[22] On a careful reading of the above definition of the word “Trade Dispute” the question that arises is as to whether present case involves a trade dispute for the purpose of Trade Disputes Act.

5 [23] The learned counsel for the petitioner further contended that the First Respondent misinterpreted the provisions of the Collective Agreement and failed to understand properly the definition given in the Trade Disputes Act. Therefore, the First Respondent should not have intervened since there was no trade dispute involved in the case.

10 [24] It was common ground that the Third Respondent was a member of the Second respondent’s Trade Union. However, the petitioner submitted that second respondent could not have represented the third respondent in this matter and submitted a report to the First respondent since the Collective Agreement was not applicable to the third respondent who was excluded there from.

15 [25] At the hearing of this application for leave the petitioner’s contention was that the second respondent had no right and could not represent the third respondent as the third respondent who was working only as an employee in the managerial capacity was only a member of the Union.

20 [26] In order to consider and determine as to whether in fact there is a “trade dispute” as far as this application is concerned it is important to consider the material tendered to this court relating to the issue of retirement age of the third respondent of the petitioner company.

#### RETIREMENT AGE

25 [27] The Third respondent, Mrs Sulochana Raman was attached to the petitioner’s company as an Assistant Manager as conceded by all the parties. Clause 3 of the Collective Agreement provides as follows:

30 *“This agreement forms part of the terms and conditions of employment for employees of New India Assurance Company Ltd to whom this agreement applies. All employees locally recruited by the company are bound by provisions of these instructions with the exception of management staff including:-*

- 35 (i) The Chief Manager  
(ii) Branch Manager and officers in charge of branches  
(iii) Manager Development  
(iv) Assistant Manager.”

[28] On perusal of the material available before the court it can be seen that the third respondent has been locally recruited by the company which is a private company and the 3rd respondent does not fall within the provisions of the Collective Agreement. However, it has not been explained to court by any of the  
40 counsel for all parties as to what are the terms and conditions applicable to the third respondent’s employment and her retirement age.

#### CONTRACT OF EMPLOYMENT

45 [29] The learned Counsel for petitioner, counsel for the third respondent or the Counsel for First Respondent failed to satisfy court as to age of the retirement of the third respondent, Mrs Sulochana Raman based on any document. All parties failed to produce the contract of employment or service which may have contained terms and conditions as to the retirement age of the petitioner in the company. Mr Nagin, counsel for the petitioner informed court that there is no  
50 contract of service in respect of the petitioner. Both the petitioner and the third respondent (the employer and the employee respectively) failed to state to court

till what date the third respondent could work as an employee of the company beyond the age of retirement at 55 years.

[30] It is pertinent to note that this application involves a matter concerning the employer/employee relationship, and any dispute in this regard has to be resolved  
5 by the Disputes Committee.

### ISSUE OF DISCRIMINATION

[31] It appears from the case records having perused the Judgments and the written submissions both in the Court of Appeal and the High Court the matter  
10 has raised an issue of discrimination attracting the provisions of sections 33 and 38 of the Constitution 1997. Section 38 (6) of the Constitution provides as follows:

“A Law, or an administrative action taken under a law, is not inconsistent with the right to freedom from discrimination on the ground of:

- 15 (a) Language;  
(b) birth,  
(c) economic status;  
(d) age; or  
(e) disability:

20 *during the period of 2 years after the date of commencement of this Constitution if the law was in force immediately before that and has remained continually in force during that period.”* (emphasis added)

Section 33 of the Constitution provides under labour relations, as follows:

25 “Every person has the right to fair labour practices, including humane treatment and proper working conditions...”

[32] On careful analysis of the above provisions it seems to us that there is some obligation on the part of the employer not to terminate employees unfairly and discriminately. However, there is no material before court to show that there is any issue of discrimination.

30 [33] The third respondent has failed to establish any discriminatory treatment on the part of the petitioner company by adducing documentary evidence in court that *another employee or any other persons’ services in similar capacity* have been extended beyond the age of 55 years.

### 35 JUDICIAL REVIEW– LEGAL PRINCIPLE

[34] We are now obliged to consider whether the petitioner is entitled to the relief sought being judicial review in this application. It is pertinent to state that the First respondent exercises public functions under the Trade Disputes Act. As alleged by the petitioner the question that has to be determined by this court is  
40 as to whether the First respondent has acted unlawfully in excess of his powers conferred on him under the Statute in deciding to accept the matter as a trade dispute based on the report submitted by the second respondent.

[35] In *Chief Constable of the North Wales Police v Evans* [1982] 1 WLR 1155 at 1174 the Lord Birghman said that

45 “Judicial review as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made.”

In *Council of Civil Service Unions v Minister for Civil Service (CCSU/GCHQ/Government Communications Headquarters)* [1985] AC 374 at 410 made observation as follows:

50 “One can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would



call “illegality”, the second “irrationality” and the third “procedural impropriety”. That is not to say that further development on a case by case basis may not in course of time add further grounds.”

5 [36] It is important and useful to refer to a discussion, regarding the availability of the judicial review remedies by Justice Pathik with reference to the above cases in the case of *Fereti Seru Dewa v University of South Pacific* [1996] FJHC 125; *HBJ0007J 1994s* (4 July 1996) under sub heading Law- legal Principles

10 “Judicial Review may be invoked by a person who is adversely affected by the misuse of public power. It is a process by which the High Court exercises its supervisory jurisdiction over the proceedings and decisions of inferior courts, Tribunals, other bodies or persons who carry out quasi judicial functions or who are charged with the performance of public acts and duties.

15 In a judicial review the Court’s function is to review not the merits of the decision in respect of which the application for judicial review is made, but the decision making process itself.”

### THRESHOLD REQUIREMENT FOR SPECIAL LEAVE

20 [37] The Supreme Court derives jurisdiction to grant Special Leave to Appeal from a final judgment of the Full Court of Appeal pursuant to s 8(2)(b) of the Administration of Decree 2009. The Supreme Court has powers to vary, set aside or affirm decisions or orders of the Court of Appeal and make such orders (including an order for a new trial and order for award of costs) that are necessary for administration of justice under s 8(3) of the Administration of Justice Decree of 2009.

25 [38] Section 7(3) of the Supreme Court Act of 1998 exhaustively deals with the circumstances in which Special Leave to Appeal could be granted.

30 [39] Learned counsel for the petitioner submitted that there are far reaching questions of law to be considered by this court which would satisfy the threshold criteria contained in s 7(3) of the Supreme Court Act 1998. Section 7(3) of the Supreme Court Act provides as follows:

“..... in relation to a civil matter (including a matter involving a constitutional question) the Supreme Court must not grant Special Leave to Appeal unless the case raises.

35 A far reaching question of law

A matter of great general public importance;

A matter that is otherwise of substantial general interest to the administration of civil justice.”

40 [40] The threshold criteria stipulated in s 7(3) of the Supreme Court Act namely what constitutes a serious question of law and matter of great general or public importance was examined and applied by the Supreme Court in number of decisions.

45 In *Dr Gasnesh Chand v Fiji Times Ltd* FJSC CBV0005 of 2011 the Supreme Court cited the decision in *Penioni Bulu v Housing Authority 2005 FJSC 1 CBV0052 of 2003S* case and followed the principles in order to consider granting of Special Leave.

In *Penioni Bulu* case the Supreme Court stated that

50 “the requirement for grant of Special Leave was worked out by the Privy Council over many years. The Case has to be one of gravity involving a matter of public interest, or some important question of law, or affecting property of considerable amount and where the case otherwise of some public importance or of a very substantial character (*Daily Telegraph Newspaper Co Ltd v McLaughlin* [1904] AC 776, 779”.

[41] It can be seen from the above decisions of the Supreme Court in Fiji that Special Leave to Appeal is not granted as a matter of course. The Court has to be satisfied that the case has to be one of gravity involving matters of public importance and some important questions of law.

5 [42] It should be noted that in order to satisfy the threshold criteria contained in s 7 (3) of the Supreme Court Act 1998 the court held in *Matalulu v DPP* 2003 4 LRC 712 that the parties should frame the questions with great care.

[43] We do not agree with the submissions of the counsel for petitioner that there is any far reaching questions of law to be determined by this court since the  
10 High Court and Court of Appeal have carefully considered the issues raised by the petitioner and the decisions of those courts are plainly right. In any event, the Trade Disputes Act as amended by Amendment Act of 1998 and the Trade Unions [Recognition] Act Cap 96 and Trade Unions [Recognition] Act 1998 have  
15 been repealed by s 265 of the Employment Relations Promulgation 2007 and therefore review of those provisions by this Court will no longer be of any public importance as such, we find that the petitioner has failed to satisfy the threshold criteria in s 7(3) of the Supreme Court Act.

[44] In the circumstances, we are not inclined to grant the relief sought by the petitioner.

20 [45] Accordingly, we dismiss the application for special Leave to Appeal with costs. We affirm the decision of the Court of Appeal dated 27th January 2010.

[1] **Wati JA.** I have had the benefit of reading the draft judgment of His Lordship Justice Hettige for which I am grateful to him.

25 [2] It is my view that this matter plainly does not meet the threshold for leave for me to delve into the merits of it.

[3] The issue in this case, the facts of which are set out by Justice Hettige, requires resolution of some important questions, which are, whether the 1st  
30 respondent was correct in accepting the trade dispute, whether there in fact was a trade dispute and whether the 2nd respondent had a right to represent the 3rd respondent in lodging the trade dispute, when the collective agreement did not apply to the 3rd respondent.

[4] In dealing with the leave application, I find that these questions are only  
35 important and personal to the appellant. They are neither far reaching questions of law, matters of great public importance nor matters that are otherwise of substantial general interest to the administration of civil justice.

[5] The subject legislation under which the trade dispute was lodged was the Trade Disputes Act Cap 97. This legislation, amongst many other matters  
40 outlined the procedures in accepting and refusing a trade dispute. The legislation also defined what a trade dispute was. Its subsequent amendment in 1998 amended the definition of trade dispute. The Trade Dispute Act Cap 97 and its amendments were repealed by s. 265 (1) (b) of the *Employment Relations Promulgation 2007* ('ERP'). Even the Trade Unions (Recognition) Act Cap 96  
45 and the Trade Unions (Recognition) Act 1998 outlining the powers of the trade union were repealed by ss. 265 (1) (d) and (f) of the ERP.

[6] Under the ERP, the term "trade dispute" is no longer in existence. The two  
50 new terms that are being used are "employment grievance" and "employment dispute". The ERP clearly defines the two terms, lays down new procedures in reporting of the "grievance" and "dispute" and also outlines the instances where the union has a right to act on behalf of an employee. The introduction of the new



employment law, thus, clearly puts the questions raised by the appellant outside the requirements of s. 7(3) of the *Supreme Court Act 1998*.

5 [7] I do not wish to make any comments on the retirement age limit in a private sector when there is no contract of employment governing the service between an employer and an employee, as the determination on the subject is pending before the Arbitration Tribunal. Before this question could be decided, the appellant had filed a judicial review against the 1st respondent's action in accepting the dispute, leaving the determination in abeyance. The task of determining the dispute can be completed now.

10 [8] The appeal must be dismissed and the orders of the Court of Appeal affirmed.

[9] The appellant must pay costs of this proceeding in the sum of \$3,000 to be equally apportioned between the 1st and 2nd respondents. The 3rd respondent need not be paid any costs as she was represented by the union at all time

15 **The Orders of the Court**

1. The application for Special Leave to Appeal is dismissed.
2. We affirm the order of the Court of Appeal dated 27th January 2010.
- 20 3. We order costs to be paid by the petitioner in a sum of \$3000 to be equally apportioned between the 1st and 2nd respondents. The 3rd respondent is not entitled to any costs as she was represented by the Union at all times.

25 *Leave to appeal refused*

Will Bateman  
Solicitor

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