

IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0060 OF 2001S
(High Court Civil Action No. JR HBJ0031 of 2000S)

BETWEEN:

ANURADHA CHARAN

Applicant

AND:

PUBLIC SERVICE COMMISSISON

Respondent

Coram: Eichelbaum, JA
Tompkins, JA
Penlington, JA

Hearing: Friday 22 August 2003, Suva

Counsel: Mr. R. P. Singh for Applicant
Mr. K. T. Keteca for Respondent

Date of Judgment: 17 September 2003

JUDGMENT OF THE COURT

Mrs Charan (the applicant) first joined the Public Service in 1967, when the general retirement age was 60. In the course of her career she held several responsible positions, culminating in promotion to principal administrative officer in 2000. By then, the retirement age was 55. At that time the Public Service Commission (the Commission) made a decision requiring the applicant to proceed on retirement leave, and declined her request

to remain in the service past her 55th birthday which was on 26 January 2001. She contended that the change in the retirement age was inapplicable to persons in her position, who had been appointed when the higher age was in force.

In judicial review proceedings, before the High Court Mrs Charan pursued the contention that in her case the applicable retirement age was 60. Further, she argued that she ought to have been allowed to take advantage of another amendment to the retirement age provisions (the Public Service (General)(Amendment) Regulations 2001) which restored the previous retirement age of 60. Although this amendment did not commence until 1 June 2001, on retirement there was due to the applicant accumulated leave of 148 1/2 days, and she contended she ought to have been allowed to take such leave, commencing on her birthday. In that case she would still have been in the Service when the amendment came into force, thus extending her retirement age to 60. The Commission on the other hand took the view that in respect of such leave as remained untaken at the date of the applicant's retirement, the Commission was entitled to pay her the equivalent value by way of compensation. The High Court (Byrne J) held against both Mrs Charan's contentions and dismissed the application for judicial review. There followed an appeal to this Court.

Both the application for judicial review and the notice of appeal raised a number of other matters relating to the applicant's retirement, but as in the High Court, the judgment of this Court, delivered on 16 May 2003, focused on the two issues set out in the previous paragraph, deciding both against the applicant. Thus the appeal was dismissed but the Court reserved the applicant leave to raise in the High Court any matters that had not been dealt with by that Court.

Before the Court there is now a motion by the applicant seeking leave to appeal to the Supreme Court. Alternatively, relying on the decision of this Court in *Charan v Shah & ors* Civil Appeal 29 of 1994, judgment 19 May 1995 the applicant has applied for an order setting aside the judgment of this Court and directing a rehearing.

The alternative application for rehearing

It will be convenient to dispose immediately of the alternative application, which counsel had difficulty in supporting. The principal ground for the alternative was the Court's statement (at 3) that the applicant was offered "\$687 representing 148 ½ days leave". This was plainly an error, the result of a slip or misunderstanding on the part of the Court. The \$687 was a leave allowance; the compensation for 148 ½ days was a much larger figure which is still in dispute. However, nothing turned on the Court's error. Since the amount owing was not an issue before the Court its misstatement was not a finding that the figure was the amount owing. Nor did the amount of the compensation affect the Court's findings on the matters actually in issue. So it would serve no purpose to have the case remitted for a rehearing on this account.

A second ground for the alternative application was that the Court did not hear the applicant on, or consider, all the issues. It is clear however that the Court heard the applicant on, and considered, the issues which had to be addressed to dispose of the appeal. Accordingly the alternative branch of the motion must fail.

The application for leave

Turning to the application for leave to appeal, in terms of s.122 of the Constitution this Court, to grant leave, must certify that leave is given on a question of significant public importance. This requires the applicant to demonstrate the existence of a question of public importance, and that it is a significant one: *Lal v. The State Criminal Appeal* AAU0004/2001S, judgment 22 November 2001. It is implicit that applicants for leave must also satisfy the Court they have a tenable argument that the question will be resolved in their favour.

If there is any merit in the applicant's contentions regarding her retirement age, the same issue must affect all members of the public service who commenced employment while the age was 60 and who are or were still employed under the same contract of

employment when they attained the age of 55. No evidence was before us as to how many other officers were affected and given the lapse of time and the recent change of the retirement age back to 60, the number may not be large. We will however proceed on the assumption that the number will be sufficient to make the issue of public importance. Further, having regard to the length of the period of service affected (i.e. 5 years) and the salary that may be earned during that time, the issue must be regarded as significant to the employees affected. Since plainly it would also be significant to the Commission, there may well be a question of significant public importance. The greater difficulty for the applicant is whether she has tenable prospects of success.

Although as noted the applicant was first employed in the public service in 1967, this employment ceased on her marriage the following year. Having been re-employed on a temporary basis, in 1974 she again obtained a permanent position. Her 1974 employment contract, dated 25 November 1974, was expressed as effective from 1 August of that year.

We address at the outset a point which if valid, would have a decisive bearing on this issue. Section 132 of the 1990 Constitution provided that the law to be applied with respect to pension benefits which are wholly or partly in respect of a period of service as a public officer that commenced after 9 October 1970, shall be the law in force on the date on which the period of service commenced. By virtue of s195(2)(b) of the 1997 Constitution, that provision remains in force. But in agreement with the earlier judgment of this Court (at 7) we are satisfied that while this provision protects pension rights, no argument is available that it addresses or affects the age of retirement. Applicant's counsel accepted that in this respect there was a distinction between pension rights, and the retirement age.

Returning to the applicant's contract of employment, in assessing whether she has a tenable argument that the judgment of this Court was wrong we find it helpful to address the following steps in turn:

1. What did the contract provide, regarding retirement?

2. At the commencement of the contract, absent any explicit contractual provision what governed the age of retirement, whether by implication, statute, statutory instrument or otherwise?
3. Could the governing factor be altered to the applicant's detriment?
4. Was it altered?
5. The merits of the applicant's argument that by virtue of her accumulated leave, her service should have been allowed to run on, so that she obtained the benefit of the 2001 amendment, increasing the retirement age to 60?.

1. The applicant's contract

The contract did not contain any explicit provision relating to retirement.

2. The factor governing the applicant's retirement age at the commencement of her contract

Plainly, any competent law which covered the applicant (whether enacted by statute, decree, or statutory instrument) would govern. Alternatively, since the contract stated that the applicant would be subject to General Orders and other regulations of a kind internal to the Public Service, if these contained retirement age provisions they would govern the applicant's situation, unless they conflicted or could not stand with any law, or for any other reason were inapplicable to her.

As at 1 August 1974, the date of the commencement of the employment contract, the position was as follows. The Public Service Commission (Constitution) Regulations 1974 came into force on 15 March 1974. Reg. 18 was predicated upon the following requirement:

When the Commission is of the opinion that an officer should be retired from the Public Service on the grounds that he has attained the age at which he can, under the provisions

of any written law for the time being in force, lawfully be required to retire from the Public Service....

The regulation proceeded to set out requirements for giving notice to officers of intention to retire them compulsorily, and giving them the opportunity of making representations as to why they ought not to be retired.

As to the law regarding retirement then in force, s10 of the Pensions Act 1958 provided:

- (1) **The Governor may require an officer to retire from service under the Government of Fiji –**
 - (a) **at any time after he has attained the age of sixty years; or**
 - (b) **at any time after he has attained the age of forty five years or, in the case of an officer appointed to the public service of Fiji on or after the first day of January, 1966, after he has attained the age of fifty five years, and also completed the minimum length of service needed to qualify him for a pension, subject, in the case of an officer appointed or selected for appointment by the Secretary of State, to the approval of the Secretary of State; or**
 - (c) **in the case of a female officer, on marriage....**

Although set in the context of the Pensions Act, s10 was in terms of general application. Subject to certain exceptions, s19 provided that the Act applied to all officers appointed to the public service after commencement of the legislation. It was not suggested any of the exceptions applied. It appears the applicant was a member of the Fiji National Provident Fund (FNPF) as distinct from being eligible for a pension under the Act. Section 19 excepted "Provident Fund Employees" but that expression was defined as meaning those who under the provisions of s3 of the Government Employees Provident Fund (Winding Up) Ordinance 1958, had elected to continue to be a contributor to the Government Employees Provident Fund (GEPF). It appears from the provisions of subsections (2) and (3) of s16 of the Pensions Act 1983 that the FNPF and the GEPF were distinct schemes. In

affidavit evidence in the High Court the applicant repeatedly maintained she was appointed under the Pensions Act 1958 and therefore subject to a retirement age of 60. In the High Court the Judge did not make any finding regarding the retirement age applicable to Mrs Charan when she joined the Service, and the case seems to have proceeded on the assumption that the applicant was correct in saying that the relevant retirement age was 60. It does not seem the respondent has argued to the contrary at any stage. Thus we proceed on the footing that at the time of her appointment the applicant could have been required to retire at age 60, subject to the procedure prescribed by the 1974 regulations.

3. Whether the governing factor could be altered to the applicant's detriment.

Since the applicant's contract was subject to any general provision of the law, and the law in question was one that could be amended by Parliament in the normal way, or by subordinate legislation if authorised, there is no tenable basis on which the applicant can claim that the provisions governing her retirement could not be altered. She could not claim any contractual protection, since the contract left the position to the general law of the country. For the same reason she could not claim any expectation that the law pertaining at the date of her appointment would not be altered. There is no question of altering the applicant's "rights" since she did not have or acquire any right that the retirement age applicable at the date of commencement of her contract would not be changed.

4. Whether the governing factor was altered

In an appendix to this judgment we set out the legislative changes, commencing 1974, so far as we have been able to trace them. It is unnecessary to discuss each item of legislation in detail, and indeed the effect of some of the provisions is uncertain. However, at latest from 1989 the general effect, so far as retirement was concerned, was to fix the retirement age of officers in the public service at 55. This followed from the Pensions (Amendment) Decree 1989, amending s9 of the Pensions Act 1983, the latter having replaced the 1958 Act. Subject to irrelevant exceptions, s19 of the 1983 Act provided that it applied to all officers in the public service at the commencement of the Act.

The 1989 Decree provided it was deemed to come into force on 1 May 1988. As such, the retrospective effect to 1 May 1988 is of no moment, so far as the appellant is concerned. However, on a broader footing the applicant argued the Decree did not change the retirement age applicable to her by virtue of previous legislation. The applicant presented this as an issue of retrospectivity, the focus of applicant's argument being the position of officers such as herself employed prior to 1 May 1988. The submission was that in respect of those persons, the lowering of the retirement age had a retrospective impact, and should not be construed as having such effect, given normal canons of statutory interpretation. *Kuini T Naqasima v Public Service Appeals Board* [1985] FLR 96 is an illustration of the application in this Court of the presumption that existing rights are not to be affected by legislation brought into force after such rights have accrued.

Apart from the deemed commencement date, which as we have said is of no present relevance, we do not read the 1989 Decree as raising any issue of retrospectivity. The applicant had not acquired any rights. The effect of the statute being that from the stated date the retirement age of public officers was to be a certain age, on its face the change applied to all officers attaining that age after the specified date. There is no justification for reading any limitation into the apparently general application of the statute to retirements after it came into effect, including those of persons already employed at that date. We do not consider there is any tenable argument to the contrary.

In submissions to the High Court applicant's counsel argued that the change to the retirement age effected by the 1989 Decree was not "saved, rectified or adopted" in the 1990 Constitution. The submission asserted that the Decree "lapsed" and that it was "repealed" by the Constitution of the Sovereign Democratic Republic of Fiji (Promulgation) Decree 1990 (the Promulgation Decree). Unsurprisingly these submissions were not repeated in the argument before us. We have not found anything in the Promulgation Decree or in the 1990 Constitution itself to support them. To the contrary s8(1) of the Promulgation Decree saved all existing laws; the 1989 Decree was not in the short list of those repealed. Section 9(1) provided that persons holding a public office shall continue to hold that office, or the corresponding office established by the Constitution. Under the proviso to subs (1) a person who under an existing law would have been required to vacate

office on the attainment of a certain age shall vacate office under the Constitution upon the attainment of that age.

The position applicable after 1989 was reinforced by subsequent legislation. Section 127(1) of the 1990 Constitution vested the power to appoint persons to the public service, and to remove them from office, in the Commission. Under s154 the power to remove was deemed to include power to require an officer to retire. The Public Service Commission (Constitution) Regulations 1990, made under the authority of s157 of the Constitution, provided a retirement age of 55 for all officers (Reg 28). This was repeated in 1999 when the Public Service Regulations 1999, made under the authority of Section 15 of the Public Service Act 1999, included the following Regulation 14(1):

Any employee must be retired from the public service on reaching age 55 years, unless the Constitution or any other written law specifies a different age in respect of any employee.

Apart from “retrospectivity”, no argument was addressed to us why these successive provisions should not apply to the applicant. For the reasons given earlier we do not accept there is any question of retrospectivity. We do not consider there is any tenable argument that after 1989, the retirement age applying to the applicant was 60 rather than 55.

5. The accumulated leave argument

By way of alternative the applicant maintained that by virtue of her accumulated leave, her service should have been allowed to run on, so that she obtained the benefit of the 2001 amendment, increasing the retirement age to 60. As noted that amendment did not come into force until over 4 months after the applicant’s 55th birthday.

Para 703(a) of the Public Service Commission General Orders 1993 provides:

In the event of resignation, termination of appointment on any grounds, or death of an Officer, he or his legal representative shall be paid pro-rata compensation for....

(d) annual leave and long service leave due to the Officer up to the date of his resignation, termination or death.....

The Commission maintained it had paid the applicant compensation for the accumulated leave due to her. As at the date of hearing before us, the precise amount due, and indeed the fact of payment, seemed still to be in dispute. However, as counsel accepted, these are not issues before this Court, nor would they be issues for the Supreme Court if leave were granted. The only substantive question is whether there is any tenable argument that the expression "termination of appointment on any grounds" does not include the ending of the employment upon the officer reaching retirement age. Counsel put to us that as perceived in this country some notion of disgrace attached to the word "termination". Depending on the circumstances "termination" may involve some stigma but in ordinary language does not necessarily do so. Termination is the act of terminating, and to terminate ordinarily means to bring to an end. Plainly "termination on any grounds" is broad enough to include the ending of a person's employment on retirement. In the context a person's employment ends, that is it terminates, when he or she retires. That proposition, as we see it, is not capable of much elaboration, and is not susceptible to any tenable contrary argument.

Result

Motion dismissed with costs to the respondent \$750.

Appendix

Legislative changes, commencing 1974

(a) The Public Service Act 1974 (Cap 74), which preceded the applicant's appointment. Section 17 (1) provided:

The Commission may, in addition to making regulations under the last preceding section, from time to time make general orders covering every

aspect of the work and privileges of employees for their guidance, assistance and conduct.

The Public Service Act 1974 was repealed and replaced in 1999. While for a time General Orders prescribed a retiring age of 60, later this was reduced to 55. On the material before us the change in the Orders occurred at latest in 1993.

(b) The Pensions Act 1983 repealed the Pensions Act 1958, s9 replacing s10 of the 1958 Act (discussed above) without however making any material change, beyond substituting the Judicial and Legal Services Commission, the Public Service Commission and the Police Service Commission for the Governor.

(c) The Fiji Service Commission and Public Service (Amendment) Decree 1987. Regulation 27 of Schedule 1, the Public Service Order 1987, provided:

27. An officer - (a) shall be required to retire on attaining the age of fifty-five years.....

(d) The Fiji Service Commission Decree 1988, containing the following:

Section 6 (1) – Power to remove persons holding public office

Section 18 (1) - Power to remove includes power to require an officer to retire

Section 25 – The Public Service Commission and Public Service (Amendment) Decree 1987 repealed “so far as they are inconsistent with this decree.”

(e) The Pensions (Amendment) (No 1) Decree 1988. The Pensions Act 1983 was amended to reduce the retirement age to 55.

(f) The Pensions (Amendment) Decree 1989 amended the Pensions Act 1983 s 9 by deleting the word "sixty" and substituting "fifty-five". Presumably, it was considered the 1987 and 1988 Decrees (see (c) and (e) above) had been or may have been ineffective in achieving the reduction of the retiring age. Another problem, at the time, may have been that the repeal of the 1987 Decree left an hiatus regarding the age limit. In light of subsequent enactments, referred to below, there is no need to explore these issues further.

(g) The 1990 Constitution. In respect of public officers, s 9 (1) provided that any person who under existing law would have been required to vacate his office on the attainment of any age, shall vacate his office upon the attainment of that age. Section 127(1) vested the power to appoint persons to the public service, and to remove them from office, in the Commission. Under s154 the power to remove included any power to require an officer to retire.

(h) The Public Service Commission (Constitution) Regulations 1990, made under the authority of s157 of the 1990 Constitution. Regulation 28 provided a retirement age of 55 for all officers.

(i) The Public Service Act 1999 (No. 8 of 1999). Section 33 repealed the Public Service Act (Cap74), the Public Service Decrees of 1988 and 1990, and any Decree or Act amending the foregoing. The applicant submitted that this Court in its earlier judgment may have overlooked this provision, but we are unable to see how it helps the applicant's case.

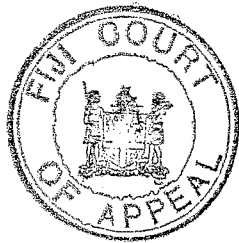
(j) The Public Service Regulations 1999, made under the Public Service Act.

Regulation 14 (1) provided that any employee must retire from the public service on reaching age 55 years unless the Constitution or any other written law specified a different age in respect of any employee.

(k) The Public Service (General)(Amendment) Regulations 2001, commencement date 1 June 2001. These restored the retirement age of 60.

Eichelbaum, JA

Eichelbaum, JA



Tompkins, JA

Tompkins, JA

Penlington, JA

Penlington, JA

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