

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

CIVIL APPEAL NO. ABU0103 of 2005S
(High Court Civil Action No.HBJ 22 of 2004S)

BETWEEN:

KAMLESH PRAKASH

Applicant

AND:

PUBLIC SERVICE APPEALS BOARD

First Respondent

MINISTRY OF AGRICULTURE SUGAR
AND RESETTLEMENT

Second Respondent

In Chambers:

Hon. Justice Gordon Ward, President

Hearing:

Monday, 12 December 2005, Suva

Counsel:

Mr Nagin for the Applicant
Mr Eroni for the First Respondent
Mr Sharma for the Second Respondent

Date of Ruling:

Wednesday, 14 November 2005, Suva

RULING

- [1] This is an application for leave to appeal out of time from a decision of Singh J given on 18 February 2005 and sealed on 23 February 2005 in which he dismissed an application for judicial review of a decision of the Public Service Appeals Board.
- [2] The applicant was provisionally promoted to the position of Principal Agricultural Officer with the second respondent. The only other contender for the post appealed to the PSAB which ruled that neither the applicant nor the other contender met the

Minimum Qualification Requirements for the post. The applicant sought judicial review of the decision of the PSAB but the application was dismissed by Singh J. In his decision, he added:

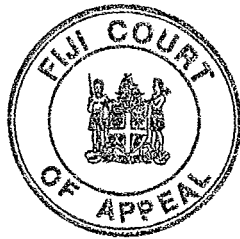
"This application was an attempt to get the court to declare that the applicant ought to be appointed to the post on merits. That is not the realm of judicial review proceedings ... "

- [3] The decision was sealed on 23 February 2005. The applicant filed notice of appeal through his solicitors on 1 March and served it on the respondent on 4 March, both well within time. However, no step was taken to apply to fix security for costs and so the appeal lapsed.
- [4] Within the time allowed, another identical notice of appeal was filed although the precise date is not clear from the papers before me. However, notice of motion for security for costs was filed on 26 May 2005. This was again out of time and the applicant now applies through another solicitor for leave to appeal out of time.
- [5] There is no doubt that the applicant has been very badly served by his former solicitors. In his affidavit in support, he deposes that he was dealing with his solicitors through a law clerk in the firm, one Suresh Charan. In late February 2005, he was advised by Mr Charan to pay a total sum of \$1380.00 which he was advised was for security for costs. He had no idea that the appeal had been mishandled but, when he enquired of its status in July 2005, was told by the firm's principal that Mr Charan had absconded with the money and the appeal had been abandoned.
- [6] He then instructed his present solicitors.
- [7] Mr Nagin, who now appears for him, has told the Court that he intends to amend the grounds of appeal as the previous grounds were drafted by the unqualified Mr Charan. His new grounds are based on a challenge to the manner in which the PSAB exercised its powers.

- [8] The application is strongly opposed by both respondents. In the affidavits filed, it is pointed out that the post was first advertised in November 2001. Following the judgment by Singh J in February 2005, it was decided to fill the post by the sideways transfer of another officer in the department. He was substantively appointed in September 2005 and still holds the post. The respondents insist it is not in the public interest nor is it good administrative practice to continue to hold the post open pending appeal.
- [9] The matters the Court must bear in mind when considering applications to appeal out of time are well known. It must examine the reason for the delay, the length of delay, the degree of prejudice to the respondent if leave is granted and the likelihood of success of the appeal. In addition there is an overriding discretion vested in the Court to allow the application if the applicant satisfies it that, in all the circumstances, justice requires that he should be given the opportunity to pursue his appeal.
- [10] The reasons for the delay do not appear to be disputed. It is entirely due to the default of the solicitors. The applicant himself is not to blame. Whether it is sufficient is a matter for the court's discretion and will also depend on the other considerations. Had it been viewed in isolation, the justice to the applicant would require the court to allow time.
- [11] However, the question of possible prejudice to the respondent may override the reasons for the delay and, in this case, there is a serious chance of prejudice. The respondent has had to wait for a very long time to fill this vacancy. Following the decision of the learned judge and after the time for appeal had passed, the respondents acted. Another officer was appointed and it is all too obviously highly prejudicial if that officer is now to await the appeal in order to know whether his position is in jeopardy. The respondents are entitled to look for finality in this matter and granting leave would seriously prejudice that.

[12] Finally, I do not consider there is a realistic chance of the appeal succeeding. Although the appeal purports to challenge the powers of the PSAB, the manner in which it was argued in the High Court was, as the learned judge correctly found, simply an attempt to appeal on the merits of the case. Mr Nagin has not filed his amended grounds and so the exact nature of the challenge to the exercise of the Board's powers is not specified. However, the basis of the learned judge's decision was to reject what was clearly a challenge to the merits of the applicant's fitness for the post and the rejection of them by the Appeals Board.

[13] It is impossible not to feel some sympathy for the applicant. As I have stated he has been ill served by his previous solicitors. He should take advice as to any remedy he may have against them but I do not consider that the overall justice of the case is sufficient to persuade me that this application should be allowed and I refuse leave to appeal out of time.



A handwritten signature in cursive script, appearing to read "Gordon Ward".

Justice Gordon Ward
President
FIJI COURT OF APPEAL

Solicitors:

Messrs. Sherani and Company Suva for the Applicant
Eroni Veretawatini Lawyers, Nausori for the First Respondent
Office of the Attorney General Suva for the Second Respondent

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