(38)

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

CIVIL APPEAL NO. ABU0080 OF 2007S
(High Court Civil Action No. HBJ 34 of 2006S)

BETWEEN:	KALISITO VUKI MAISAMOA	*Appellant*
AND:	CHIEF EXECUTIVE OFFICER FOR HEALTH	*First Respondent*
AND:	PUBLIC SERVICE COMMISSION	*Second Respondent*
AND:	THE ATTORNEY-GENERAL OF FIJI	*Third Respondent*
AND:	PUBLIC SERVICE APPEAL BOARD	*Fourth Respondent*

Coram: Randall Powell, JA
Andrew Bruce, JA
Izaz Khan, JA

Hearing: Tuesday, 1st July 2008, Suva
Wednesday 2nd July 2008, Suva

Counsel: Appellant in Person
N. Prasad and S. Levaci for the First, Second and Third Respondents
A Veretawatini for the Fourth Respondent

Date of Judgment: Thursday, 10th July 2008, Suva

JUDGMENT OF THE COURT

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1 Kalisito Maisamoa was a Senior Assistant Health Inspector with the Ministry of Health. Complaints about his conduct as a public servant were made and on 4 April 2004 he was suspended from duty pending investigation into those complaints. In due course, 3 disciplinary charges were levelled against him.

2 A disciplinary hearing was conducted by the Public Service Commission on 11 November 2004. Mr Maisamoa was found guilty of 2 of the 3 charges. He was invited to make submissions as to the disposition of the matter in the light of those findings. A hearing for that purpose was set for the 30th of November. Following that hearing, Mr Maisamoa was dismissed.

3 Mr Maisamoa then appealed to the Public Service Appeal Board. That Board held a hearing on 9 May 2006 and dismissed the appeal on 10 May 2006.

4 Mr Maisamoa applied to the High Court for leave to judicially review the decision of the Public Service Appeal Board. This had a somewhat checkered history which is relevant to the disposition of the present proceedings. The affidavit said by Mr Maisamoa to ground the history of proceedings was sworn on the 19th of September 2006. Mr Maisamoa deposed that on 20 July 2006, he had initiated judicial review proceedings against the decision of the Public Service Appeal Board in action number HBJ 26 of 2006. (The action number at the hearing of his affidavit was HBJ 34 of 2006. The relevance of this will appear shortly.) Mr Maisamoa deposed that the application in HBJ 26 of 2006 was first heard in Chambers on 17 August 2006 and adjourned to 1 September 2006. The affidavit asserts that on 1 September 2006 when the matter was called on in court the lawyer then representing him together with the lawyer for the Public Service Appeal Board agreed to discontinue the application for leave to judicially review the public service appeal board. The affidavit asserts that the basis for this was that the application was to be "re-filed".

5 Mr Maisamoa deposed in his affidavit that on 18 September 2006, when he sought to "re-file" the application for leave to judicially review the decision of the Public Service Appeal Board, he was told that the application was out of time and that he had to "file a motion to seek the discretion of the court to approve the same."

6 On 19 September 2006, Mr Maisamoa applied again to the High Court for leave to judicially review the decision of the Public Service Appeal Board. This was entered

as action number HBJ 34 of 2006. (The affidavit referred to in the preceding paragraph was an affidavit in that specific cause.)

7 Order 53, Rule 4 of the Rules of the High Court requires that such an application be made promptly and, in any event, within three months from the date when the grounds for the application first arose. At this stage, the application was more than one month out of time. Indeed, when the initial application for judicial review, was "discontinued" (*ie* 1 September 2007) the time had expired for the institution of judicial review proceedings.

8 On 6 September 2007 the application in HBJ 34 of 2006 (*ie* the second application for judicial review) came on for hearing before Singh J. Judgment was delivered on 8 November 2007. Singh J refused the application. What the learned judge did was to indicate that he had refused the application because the application was out of time. The learned judge then indicated that if he was wrong about that he would consider the merits of the application for leave. He did so and ruled that the application that would have been refused on that basis. In the result, the application was refused and costs were awarded against Mr Maisamoa.

9 Throughout the High Court proceedings in connection with HBJ 34 of 2006, Mr Maisamoa was represented by a lawyer.

10 Mr Maisamoa lodged a notice of appeal on 17 December 2007 against the decision of Singh J. In the Notice of Appeal the Appellant asserted that he sought orders as follows:

(1) The judgment delivered by Singh J be set aside and the enforcement of the judgment thereon be stayed.

(2) The judgment be reversed and be in the appellant's favour.

(3) That the costs of the proceedings together with the appeal be paid by the Respondent to the Appeal.

The grounds for appeal are as follows:

(1) The Judge erred in law and in fact when he did not take into account and indeed overlooked the reason submitted by Mr Maisamoa in his affidavit in

support of the ex parte Notice of Motion dated 19 September 2006 sworn on the 19th of September 2006.

(2) The Judge erred in fact and law when he based his decision on the error made by the solicitor rather than the grounds and merits of the judicial review.

(3) The Judge erred in law and fact in not taking into account that the public service appeal board allowed 465 days for the public service commission to respond to the written submissions of the appellant; the learned judge erred in his interpretation of section 26(8) of the Public Service Act 1999 and the conclusions drawn by the learned judge on the basis of an interpretation of that provision.

(4) The Judge erred in law and in fact in not properly perusing the grounds of the application to seek judicial review and correlating it probably with the conduct of the fourth respondent the Public Service Appeal Board.

(5) That the decision of the learned judge was not based on merit.

11 The appeal to the Court of Appeal was listed for 2:15 p.m. on 1 July 2008. The hearing of the appeal did not commence auspiciously. When the matter was called on, counsel for the Public Service Appeal Board (the 4th respondent in the appeal proceedings) did not appear. The matter was adjourned for 15 minutes in the hope that counsel would arrive. The 4th respondent was, of course, the decision maker whose decision was challenged in the application for judicial review.

12 At 2:30 p.m. counsel for the Public Service Appeal Board had not attended and it was resolved to proceed. The Court had the benefit of written submissions from the Public Service Appeal Board and it was not considered appropriate to delay the matter any further. Mr Maisamoa made the point that he had, in effect, been out of work since 2004 and was anxious to bring the matter to a resolution.

13 However, the problems with bringing this matter to a resolution did not end there. Mr Maisamoa pointed out that he had not received copies of the written submissions on behalf of the respondents. Counsel for the 1st, 2nd and 3rd respondents very frankly accepted that service had been affected on the former legal representatives of the appellant. It was obvious from the quick perusal of the record that the appellant was acting in person.

14 In view of the expressed desire by the appellant to move this matter towards a resolution, the court considered two options. These were:

(1) Proceed with the hearing on 1 July 2008 and gave the appellant the opportunity to respond in writing to the submissions of the respondents.

(2) Adjourn the matter to the following day on the undertaking that copies of the written submissions of the respondent's would be forthwith given to the appellant.

15 The Appellant indicated that he wished to proceed on the basis of the 2nd option. Counsel acting for the 1st, 2nd and 3rd respondents very helpfully arranged then and there for copies of the submissions of all respondents to be given to the appellant.

16 The hearing resumed in the afternoon of 2 July 2008. Things started on a marginally better footing at least in the sense that counsel for the 4th respondent was present. Regrettably, no real explanation for her absence on the previous day's hearing was proffered. Perhaps more regrettably, counsel for the 1st, 2nd and 3rd respondent proffered a bundle of authorities in the course of her submissions. The practice is that the authorities should be provided at the time that written submissions are filed. Regrettably, no real explanation for this omission was proffered. The point of filing authorities at the same time as the written submissions is to assist the court to prepare for the hearing and to provide reasonable information to the other parties to the proceeding. We recognize all of the difficulties that counsel have whether practising within the Attorney General's Chambers or in private practice. Nevertheless, this approach was regrettable.

17 The Appellant indicated that notwithstanding the foregoing, he was ready to proceed. He handed up an additional written submission. It was not possible for the Court to fully read this at the time although no difficulty was experienced in getting at least the gist of it for the purpose of conducting hearing of the oral argument from the parties. The Court indicated that after hearing the oral argument (including on the additional submission) the Court would carefully read the new written submission from the Appellant. We have done so - as we have with respect to all of the other written

submissions proffered. They have all been helpful in bringing this matter to a resolution.

18 As has already been indicated, the present proceedings for judicial review were instituted well out of time. One of the principal features of judicial review as a remedy is that it must be instituted promptly. Indeed, Order 53, Rule 4 makes that plain from the language of the rule which requires that applications for leave must be made promptly and in any event within three months from the date when the grounds for the application first arose. Indeed, so critical is promptness to the remedy of judicial review that it is well established that leave may be refused on the ground of undue delay even if the application is made within three months: De Smith, Woolf & Jowell, *Judicial Review of Administrative Action* 5th edition page 665-666.

19 Nevertheless, the authorities recognize that the courts have a discretion to extend time. Under the Rules the court may extend time if the applicant shows there is good reason for the delay. The circumstances which might qualify to be considered as good reason include:

(1) Time taken to obtain legal aid to conduct the judicial review: ***R v Stratford-on-Avon District Council, ex parte Jackson*** [1985] 1 WLR 1319;

(2) The importance of the point of law at stake: ***R v Secretary of State for the Home Office, ex parte Ruddock*** [1987] 1 WLR 1482; and

(3) The pursuit of alternative remedies: ***R v Stratford-on-Avon District Council, ex parte Jackson*** [1985] 1 WLR 1319.

It goes almost without saying that the class of cases which might qualify to be characterised as good reason is not closed and even if the explanation for the late institution of proceedings came within the categories mentioned above, that may not justify an extension of time. One obvious additional category that might be considered is where the injustice to an Applicant was obvious and egregious and where justice would not be done if the court shut out the Applicant notwithstanding some delay. Plainly, as the Appellant contended, the court would have to consider all of the relevant facts before coming to a decision on this matter.

20 While no authority was cited before Singh J when he came to consider whether time should be extended to permit the proceedings in HBJ 34 of 2006, the principles cited above are so well established that citation of them by the Judge would have been otiose.

21 It is elementary that if an indulgence is sought from the court such as an extension of time to permit proceedings for judicial review, as counsel for the 1st, 2nd and 3rd Respondent submitted, it is incumbent upon the party seeking that review to place sufficient facts and circumstances before the court to justify such a course being taken. Complaint is made by Mr Maisamoa that the judge failed to take into account what he had asserted in his affirmation dated 19 September 2006. With respect, that cannot be right. It is clear that Singh J had the affidavit before him and it is plain beyond argument that he read it. At page 7 of the record he refers to the original application HBJ 26 of 2006 being discontinued. The judge then said "The applicant does not in his affidavit disclose why the earlier action was discontinued." That is perfectly accurate. That he did not recite each and every word in his judgment is not a valid criticism.

22 Mr Maisamoa was represented by a lawyer in the proceedings before Singh J. The learned judge noted that the lawyer told the court that the discontinuance had been due to some "technical difficulties". The judge goes on later to say that the affidavit did not disclose what those technical difficulties were or why such difficulties could not be met by an application for amendment. A clue as to the perceived "technical difficulties" comes in the notes of proceedings where counsel for the then Applicant (now the Appellant) notes that the proceedings were withdrawn "due to technical error in the names of the parties. We had only sought relief against Public Service Appeals Board." (*sic*) (Record, page 350) The Judge records that counsel for the Applicant then said "Contents of the application remain one and the same." [Emphases by the undersigned]

23 Three points need to be made at this stage. First, (and this is relevant to the complaint made in Ground 1 of the grounds of appeal) Singh J had perfectly

accurately summarised the essence of the affidavit of Mr Maisamoa of 19 September 2006. Second, even on appeal before the Court of Appeal, no attempt was made to explain what those difficulties were or even to exhibit the alleged offending application for judicial review. In this regard we have not overlooked that Mr Maisamoa was not represented on appeal. Nevertheless his submissions both written and oral were very articulate to the level that might make many counsel envious. On appeal, he asserted that he did not know what those "technical difficulties" were. The third point to be made arises from the fact that after the hearing was concluded, we called for the file in HBJ 26 of 2006 to see if we could ascertain what the technical difficulties might be. This was based on the premise that our provisional thinking was that we could not think of any realistic circumstances which could not have been cured by amendment or service of the papers on interested parties.

24 The possibility of amendment was, of course, one of the points which Singh J rightly makes in his judgment. The application for judicial review in HBJ 26 of 2006 is an application complaining of the decision of the Public Service Appeal Board. While we have not considered the application, the supporting affidavit or the statement which is required under the Rules of Court to accompany the application in minute detail, that they appear to essentially cover the ground covered in the application for judicial review in HBJ 34 of 2006. They are by no means the same document. As has been noted, Singh J recorded counsel for the Applicant as saying they were "one and the same". Indeed, the same respondent is mentioned in both applications. The only conceivable technical point might be that in the original application for judicial review, the statement required under the Rules of court and the affidavit in support of the application, the respondent is named as the Public Service *Commission* Appeals Board. [emphasis added] However, it is not as if that caused anyone any difficulty because even the briefest reference to the Notice of Opposition reveals the respondent correctly described. Indeed, by the time of the order made by Jitoko J to permit the discontinuance of HBJ 26 of 2006 on 1 September 2006, the Public Service Appeal Board had been correctly described. We cannot see any basis for saying that there were "technical difficulties" which would have prevented the

original action going forward. It may be argued that the emphasis (or emphases) differs to some extent between the two sets of documents but there is nothing in the earlier set which could not have been amended if the Applicant wished to shift the emphasis.

25 Lest there be any doubt about it, we are satisfied, contrary to the assertion in Ground 1 that the learned Judge had full regard to the affidavit of the Appellant sworn on 19 September 2006. He also, as he was entitled to do, had regard to submissions.

26 All of the foregoing simply reinforces the view of Singh J that he could find no ground for justifying the filing of HBJ 34 of 2006 and for extending time to proceed. It is clear to us that the learned judge had the facts before him sufficient to come to the conclusion that there was no good ground to extend time. Had the learned judge called for and perused the file in HBJ 26 of 2006, we are in little doubt that his views would have been reconfirmed.

27 It is contended by the Appellant that the learned judge in making his decision was **Wednesbury** unreasonable. (***Associated Provincial Picture Houses v Wednesbury Corporation*** [1948] 1 KB 223.) In paragraph 3.2 of his written argument, the Appellant helpfully quotes the relevant passage. The judge had all the relevant facts before him. He was properly directed in law. The judge was right to refuse to extend time and to dismiss the application with costs.

28 Ground 2 of the Grounds of Appeal asserts that the Judge was wrong to base his decision on the error of the Appellant's lawyer and should have regard to the merits of the judicial review.

29 This ground starts on a false premise, that the judge had regard to errors on the part or the lawyer for the Appellant. The second premise in this ground is wrong too: the judge did go on to look at the merits of the application for leave to institute judicial review. The problem with this ground is that it misses the fundamental procedural point that this was only a leave application. All that needs to be demonstrated at the

leave stage is that there is an arguable case. In ***State v Connors, ex parte Shah*** [2008] FJHC 64 Scutt J correctly observed about the process at the leave stage:

> At this stage a full review of the facts is unnecessary. Nonetheless, a court is obliged to sufficiently pursue the material provide to determine whether an applicant raises an issue arguably involving an error in law, a serious error in fact; a violation of natural justice or procedural fairness, or an excess of jurisdiction by the decision-maker the subject of the application.

Singh J examined the so-called merits in some detail. That is no criticism of him. The issue we have to determine is whether the application revealed an arguable case of judicial review.

30 Ground 3 asserts that the Judge failed to take account of the delay of something of the order of 465 days occasioned by the failure of the Public Service Commission to file their response to the appeal of the Appellant to the Public Service Appeals Board. This delay is, as the Appellant says, in the face of repeated requests by the Appellant to bring the matter to finality. This is also in the face of Part 5 of **Public Service Act** which continues the existence of the Public Service Appeal Board and, in particular, section 26(8) which provides:

> In performing its functions, the Appeal Board must endeavour to combine fairness to the parties with economy, informality and speed.

31 Section 25 of the Public Service Act grants a right of appeal to a member of the civil service against the taking of disciplinary action against a member. There are qualifications to that right but none of those are relevant to present case. Section 26 of the Act requires that an appeal be commenced by a notice of appeal setting out the grounds of the appeal which must be lodged within 21 days of the date on which the decision was published or notified to the appellant or within any further time allowed by the Appeal Board on sufficient reason being shown by the applicant. Proceedings are not open to the public a person may attend the hearing with the authority of the Public Service Appeals Board. Parties to the appeal might be represented by a lawyer. It is plain that an appeal under Part 5 is in the nature of a re-hearing because section 26(3) provides:

> For the purpose of determining an appeal, the Appeal Board has the same powers and authority to summon witness and to obtain evidence as are conferred upon the commissioners of a Commission of Inquiry by section 9 of the Commissions of Inquiry Act, and section 14 and 17 of the Act apply, with necessary changes, in relation to the powers and authority vested in the Appeal Board by this Part.

Further, section 26 (4) provides the onus of proof in these proceedings. The onus of proof is declared to rest with the appellant.

32 In addition to the injunction in section 26(8) of the Act that the Board must endeavour to combine fairness to the parties, economy, informality and speed, to which reference has already been made, section 26(9) declares that while the Board is not bound by the procedures, legal forms and rules of evidence of a court of law, the Board should:

(a) accord natural justice to the parties to the appeal;

(b) keep a written record of its proceedings; and

(c) give reasons for its decision on the appeal.

33 The formula which is seen in this section of the Act is not uncommon in modern legislation throughout the common law world. What is admirable about this legislation is the explicit injunction to the Board to conduct its proceedings with fairness and to accord to the parties natural justice.

34 According to the appellant, the difficulty with the delay on the part of the response by the Public Service Commission is to be set against the background that the Commission was originally given 21 days within which to respond. Further, once the Commission's response was forwarded to the board (which response was said to include not only argument about additional evidence) the appellant sought to file his own response to the response of the Commission. Quite unattractively, the minutes of the hearing before the Board reveal at paragraph 8.1 the following: (Record, page 220 *et seq*):

> The Board noted that the appellant had submitted his appeal to the PSAB on 15/12/04. The PSC had respondent to the appellant's grounds of appeal on 22/3/06 and the appellant confirmed receiving the same. The exchange of documents has been satisfactorily carried out.

That statement is an extraordinarily bland one. It elides two obvious points. The first is that the minutes do not note the delay of something of the order of 465 days. Given that the appellant was pressing for the matter to be brought to a conclusion the description of the exchange of documents being satisfactorily carried does not quite gel.

35 There was an additional difficulty about this so-called satisfactory exchange of documents which cannot be overlooked. In the affirmation of Mr Joseph Bisa, the Secretary of the Public Service Appeal Board, sworn on the 15th day of November 2006 he notes:

> [The] supplementary submission dated 1/5/06 from [Mr Maisamoa] was received later by the Board as by that time the Secretary at has already compiled and bind (sic) its submission for the case ready for the Board's hearing on 9/5/06. However, [Mr Maisamoa] was advised that he may introduce his supplementary submission during the hearing proper as long as it does not contain any new evidence.

Two comments can be made about that. The idea that the Public Service Commission might have something of the order of 465 days to deliver its materials and the Secretariat to the Board not being prepared to receive the written submission of Mr Maisamoa is, to put it as mildly as it can be put, a little difficult to comprehend. That said, it should not be overlooked that the delivery (or attempted delivery) of the document was about 6 weeks after the Public Service Commission delivered their document. Second, the assertion of the staff of the Secretariat (it is assumed that the Secretary himself would never have made such an error) who told Mr Maisamoa he could not call any further evidence overlooks section 26(3) of the very Act that the Secretariat is required to administer. Luckily, as Mr Maisamoa ultimately accepted before us, he and his counsel were aware that they were not so restricted and he accepts that he and his counsel had a proper opportunity to present such material as they thought fit.

36 The attention of this Court was drawn to a note dated 9 August 2005 addressed to the Chief Executive Officer for Public Service from the secretary to the Public Service Appeal Board in which a number of cases which were dealt with in 2004 and 2005 were detailed which revealed substantial delays. (Record, page 214-215) This said the respondent's was suggestive of endemic delays in that area of the public service (here, we are speaking as a generality) which deals with disciplinary matters. On the assumption that the note from the Secretary to the Public Service Appeal Board reveals all the cases, or a representative sample of them, then there is, speaking as a generality, substantial cause for concern although, slightly adapting the well known equitable maxim, it may be that the courts do not come to this matter with absolutely spotlessly clean hands. Further, the delay in relation to the case of the appellant is approximately twice that of the worst case in the list to which reference has been made.

37 Section 29(2) of the **Constitution** provides that every party to a civil dispute has the right to have the matter determined by a court of law or, if appropriate, by an independent and impartial tribunal. Section 29(3) of the **Constitution** provides that every person charged with an offence and every party to a civil dispute has the right to have the case determined within a reasonable time. It is not settled whether the proceedings before the Public Service Appeal Board could be characterised as a civil dispute within the meaning of section 29 of the Constitution. Even if the proceedings before the Board are outside strict scope of section 29(3) of the **Constitution,** the constitutional imperative created in that provision is reinforced by section 26(8) of the Public Service Act.

38 It is appropriate to note at this juncture a submission on the part of counsel for the 1st, 2nd and 3rd Respondents. It was suggested that section 14(3) of the **Public Service Act** requires the filing of the appeal within 21 days but the Act is silent as to the time for the Public Service Commission to file a response. The Public Service Commission is not thereby given something like a blank cheque to file when it is

good and ready. With respect that argument is simply untenable and denies the very basis of section 26(8).

39 There was, by reference to section 26(8), a regrettable absence of speed in the determination of the appeal of Mr Maisamoa. Further, some of the authorities on the topic of delay in decision making in the area of public and administrative law would suggest that judicial review was available only if the delay could be characterised as an abuse of process: ***R v Chief Constable of the Merseyside Police, ex parte Calveley & Others*** [1986]1 QB 425. This decision was cited for this proposition in both HWR Wade *Administrative Law* 6th edition, page 438-439 and De Smith, Woolf & Jowell *Judicial Review of Administrative Action*, 5th edition, paragraph 13-051. See also ***R v Home Secretary, ex parte Phansokar*** [1976] QB 606; ***R v Durham Prison Governor, ex parte Hardial Singh*** [1984] 1 WLR 704; ***R v Inland Revenue Commissioners, ex parte Preston*** [1995] AC 835; *Teh Cheng Poh Public Prosecutor, Malaysia* [1980] AC 458. Perhaps to underline the discretionary nature of the remedy, in ***R v Inland Revenue Commissioners, ex parte Preston***, notwithstanding the fact that the House of Lords considered that there was unacceptable delay, they declined to intervene. More recently, things may have altered in this field - albeit fractionally - in ***Dyer v Watson*** [2004] 1 AC 379, the House of Lords looked at the issue of delay in this context and against the background of Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms which (amongst other matters) entitles "everyone ... to a fair and public hearing within a reasonable time" in the determination of "civil rights and obligations". In that context, Lord Bingham concluded that "The threshold of proving a breach of the reasonable time requirement is a high one, not easily crossed". While it is fair to say that this decision has been the subject of criticism in the High Court of Australia in ***NAIS & Others v Minister for Immigration and Multicultural and Indigenous Affairs & Another*** (2005) 228 CLR 470, the compelling attraction of ***Dyer v Watson*** is that it expressly considers written human rights guarantees against the background of European human rights law which are relevantly in the same language as section 29(2) of the Constitution *ie* the requirement that such proceedings be determined "within a

reasonable time". It would be impertinent, if not downright dangerous, to import European human rights jurisprudence into every phrase of the Constitution which is the same or closely similar to the European Convention for the Protection of Human Rights and Fundamental Freedoms, but this seems to be the right place and the right context to do precisely that via ***Dyer v Watson*** (above).

40 The appellant argued before Singh J that the decision of the Public Service Appeal Board was unreasonable by reason of the delay to which reference was already been made. It would appear to have been argued before Singh J that when this was combined with the rejection of the written submission in answer to the much-delayed response of the Public Service Commission that this produced an unreasonable decision. It would appear that the argument on unreasonableness merged into an argument that the appellant was not accorded procedural fairness. That is certainly how the judge approached the matter. The learned judge said that this ground there is little merit. The judge rightly observed that the appellant and his then lawyer had a reasonable opportunity to present his case before the Board. The learned judge correctly noted section 26(8) of the Public Service Act. He observed, and we agree, the Board is given a measure of flexibility and informality. The judge concluded that the appellant was accorded procedural fairness and the process was not unreasonable. While we think that the procedure left much to be desired in terms of delays, in the result, we agree with the learned judge. There is certainly no basis on which we could interfere with his discretionary finding under this heading. The fact that the Public Service Appeal Board may have fallen below the standards imposed on it by section 26(8) the Act does not, of itself take the matter anywhere. The judge, contrary to the written submissions at paragraph 3.4 did not misinterpret section 26(8). That provision does not impose the rigidity and inflexibility suggested implicitly by the Appellant. There is no arguable case for judicial review on the basis of delay on the failure to accord procedural powers because of delay

41 As presented before the High Court, and before the Court of Appeal, (see especially the additional written submissions of the Appellant) the next argument adverted to by

the appellant was that the acceptance by the Board of the submission of the Public Service Commission up to 465 days late indicated bias on the part of the Public Service Appeal Board. The learned judge, in rejecting this argument, adverted to the decision of the House of Lords in ***Porter v Magill*** [2002] 2 AC 357. The judge held, following that decision, the issue was whether a fair minded and informed observer, having considered the relevant facts, would conclude that there was a real possibility that the tribunal was biased.

42 We think that in view of the at least perceived difference between the test which operates in Australia as opposed to that in England and Wales, it is prudent to consider whether Singh J applied the correct test in this regard.

43 In ***Porter v Magill*** [2002] 2 AC 357, Lord Hope of Craighead, delivering the leading speech in that case, said that the question is whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.

44 In ***AWG Group v Morrison*** [2006] 1 WLR 1163 the English Court of Appeal sought to explain and apply ***Porter v Magill***, as follows:

(1) A judge is automatically disqualified from hearing a case on the ground of apparent bias if, on an assessment of all the relevant circumstances, the conclusion was that the principle of judicial impartiality would be breached.

(2) This disqualification is not a discretionary case management decision reached by weighing various relevant factors (such as inconvenience, costs, and delay) since there was either a real possibility of bias or there was not.

(3) The test is, having ascertained all the circumstances bearing on the suggestion that the judge was (or could be) biased, the court must itself decide "whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility ... that the tribunal was biased".

(4) "An appellate court is well able to assume the vantage point of a fair-minded and informed observer with knowledge of the relevant circumstances. It must itself make an assessment of all the relevant circumstances and then decide whether there is a real possibility of bias".

(5) An example of a real danger of bias is where there was "animosity between the judge and any member of the public involved in the case". The categories of such danger are not closed: "if, for any other reason, there were real ground for

doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections" then recusal would be necessary.

(6) In most cases, "the answer, one way or the other will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal".

(7) Where the hearing has not yet begun, there is scope for the sensible application of the precautionary principle. ... [P]rudence naturally leans on the side of being safe rather than sorry.

This decision was informed not only by the binding decision of ***Porter v Magill*** (above) but also ***Taylor v Lawrence*** [2003] QB 528 and ***Locabail (UK) Ltd v Bayfield Properties & Another*** [2000] QB 451, 1 All ER 65.

45 The test is expressed differently in Australia. In ***Webb v R*** (1994) 181 CLR 41, 73 A Crim R 258, 68 ALJR 582,122 ALR 41 the test for bias which applies in Australia was held to be:

> When it is alleged that a judge has been or might be actuated by bias, this Court has held that the proper test is whether fair-minded people might reasonably apprehend or suspect that the judge has prejudged or might prejudge the case.

46 In ***Re Refugee Review Tribunal; ex parte H*** (2001) 75 ALJR 982; 179 ALR 425, the High Court of Australia held that the test for hearings in private (such as prima facie occurs before the Public Service Appeal Board) is:

> in the case of administrative proceedings held in private, to formulate the test for apprehended bias by reference to a hypothetical fair-minded lay person who is properly informed as to the nature of the proceedings, the matters in issue and the conduct which is said to give rise to an apprehension of bias. Whether or not that be the appropriate formulation, there is, in our view, no reason to depart from the objective test of possibility, as distinct from probability, as to what will be done or what might have been done. To do otherwise, would be to risk confusion of apprehended bias with actual bias by requiring substantially the same proof.

47 The approach in New Zealand is uncertain as is recognised by the Court of Appeal of New Zealand (Young P, Hammond and Wilson JJ) put it in ***Muir v Commissioner of Inland Revenue & Anor*** [2007] NZLR 495 "it has to be said that the law in this area is in an awkward state in New Zealand". Later the law was described by that Court as

in a "somewhat messy state." In that case the New Zealand Court of Appeal reviewed the New Zealand and noted that in *Auckland* ***Casino Ltd v Casino Control Authority*** [1995] 1 NZLR 142 the New Zealand Court of Appeal adopted as the law of New Zealand on the topic of apparent bias the speech of Lord Goff in ***R v Gough*** [1993] AC 646, 670 as follows:

> [F]or the avoidance of doubt, I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking in terms of possibility rather than probability of bias. Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him ....

48 The Court in ***Muir v Commissioner of Inland Revenue & Anor*** then noted that along had come the Australian statement of the position as we have noted above. With elegant simplicity, the New Zealand Court of Appeal described the difference in the approaches as follows at [2007] NZCA 334, paragraph 49:

> The difference between the ***Porter v Magill*** test and the approach in the High Court of Australia is one of "reasonable apprehension" of bias as opposed to a "real possibility" of bias.

49 The test which would appear to be accepted in Hong Kong requires the court to consider the matter in two stages. The first requires that the court must ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. The second stage requires the court to then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the tribunal was biased: ***Deacons v White & Case Ltd Liability Partnership*** (2003) 6 HKCFAR 322; ***HKSAR v Leung Kwok Hung & Others*** (2007) 10 HKCFAR 148. This test seems to pay homage to if not replicate ***Porter v Magill*** (above).

50 The approach that applies in Fiji seems to favour the ***Porter v Magill*** approach. In ***Latchman Brothers Limited v Sunbeam Transport Company Limited*** (Fiji Court of Appeal Nos. 45, 51, 57 and 67 of 1983) the Court held that the test was "would the circumstances cause a reasonable onlooker to think that there was a real likelihood of

bias". In contrast, in ***Mills v State*** [2005] FJCA 6, the Court of Appeal appears to have adopted a test based on Canadian Supreme Court jurisprudence. (see: ***R v Généreux*** [1992] 1 SCR 259) That test was (per Lamer J): "The appropriate question is whether the tribunal, from the objective standpoint of a reasonable and informed person, will be perceived as enjoying the essential conditions of independence." That was a decision as to (amongst other things) whether a military tribunal convened to try mutiny charges might be said not to be impartial. The test apparently adopted has echoes of the Australian position. Neither ***Latchman Brothers Limited v Sunbeam Transport Company Limited*** (above) nor, perhaps more critically, ***Porter v Magill*** (above) appear to have been cited in that case. That said, the correctness of that decision is unassailable. (The current position in Canada would appear to be same. See ***Baker v Canada (Minister of Citizenship and Immigration)*** [1999] 2 SCR 817.)

51 The Supreme Court of Fiji in ***Koya v State*** [1998] FJSC 2 considered but did not completely resolve the issue. The Supreme Court indicated a preference for the decision of the New Zealand Court of Appeal in ***Auckland Casino Ltd v Casino Control Authority*** (1995) 1 NZLR 142. In ***Auckland Casino Ltd v Casino Control Authority,*** Cooke P (as he then was) held in the context of a comparison between the approach of the High Court of Australia in ***Webb v R*** (above) and ***R v Gough*** [1993] AC 646 that he did not think there was any substantive difference between the two decisions. That decision obviously predates ***Porter v Magill.*** That decision modified, at least to some extent, the law in England and Wales as expressed in ***R v Gough*** (above). There is, perhaps, as the New Zealand Court of Appeal so elegantly put it, something more of a difference between the approach in ***Webb v R*** and that in ***Porter v Magill***. Whether that carries with it the implication that, as ***Auckland Casino Ltd v Casino Control Authority*** seems to be less in favour in New Zealand, it is time to revisit the issue of what is the appropriate test under the law of Fiji is something we have consider. The decision in ***Porter v Magill*** (above) has been expressly followed in ***Re Cao Juan Wen*** [2002] FJHC 27 (Scott J) and in ***State v Chief Executive Officer, Ex parte Fiji Public Service Association*** [2004] FJHC 284 (Pathik J). The latter is, we say with respect, a detailed and principled examination of the law in this area.

52 It seems to us that ***Porter v Magill*** (above) (as informed by ***AWG Group v Morrison*** [2006] 1 WLR 1163) is the correct approach for Fiji although it may be that the distinction between that approach and the approach in ***Webb v R*** is, in practical terms and practical outcomes, very, very narrow if there is any at all. ***Porter v Magill*** (above) if it is different stresses the importance of the observer being fully and properly informed. It may just require that observer to repose a fraction (and we stress "a fraction") more trust in the judiciary before concluding that there is a problem which requires recusal if dealt with prospectively and overruling or judicial review if done retrospectively. We think that Singh J was right to apply that test. We are in no doubt that even if he had chosen the approach in ***Webb v R*** or ***Auckland Casino Ltd v Casino Control Authority*** or, more importantly, ***Koya v State*** [1998] FJSC 2, he would have inevitably come to the same conclusion. The acceptance without any apparent demur by the Public Service Appeal Board of the submissions of the Public Service Commission does not indicate an arguable case of bias. It indicates sloppiness and bad administration which should not be tolerated. However, such sloppiness and bad administration as there was should not and, in our view did not, get in the way of the proper determination of the appeal to the Public Service Appeal Board by the Appellant. The record shows that once the Public Service Appeal Board (albeit finally) got down to the business of hearing and determining the appeal of the Appellant, there is nothing in the record to indicate any arguably reviewable failure by the Board. The learned judge so held. We think he was right to do so.

53 In paragraph 3.3 of his written argument, the Appellant contends that in countenancing the acceptance by the Public Service Appeal Board of the submission of the Public Service Commission, but not countenancing the late filing of the application by the Appellant of his judicial review that the learned judge had violated the equal treatment guarantees under the Constitution. Section 38(1) of the Constitution guarantees equal treatment under the law. On its face this is an ingenious argument but like many such arguments, it falls away on even the most superficial examination. In short, however bad that Public Service Appeal Board was

to accept the submission of the Public Service Commission as it did, like is not being contrasted with like. The rules governing the filing of applications for judicial review are, for compelling and long-standing policy reasons, very tight. To excuse the delay of the administration of cases of judicial review in cases which themselves complain of administrative delay would be to add absurdity to what is, in many respects unacceptable behaviour on the part of the Public Service Appeal Board.

54 Ground 5 of the Grounds of Appeal (paragraph 3.5 of the Appellant's written argument) complains that the judge did not fully and properly peruse the grounds of the application to seek judicial review. He did. His reasons are careful and thorough and we think they cannot be faulted.

55 However, it is plain that one of the many grievances that Mr Maisamoa has expressed about the process is that it took no less than 465 days for the Public Service Commission to respond to the appeal he had lodged. While we accept that the Public Service Commission is a very busy organisation and those within the Commission who are concerned with responding to appeals by persons in the position of Mr Maisamoa must have great demands placed upon their time, it is difficult to see how such a delay could be considered acceptable to the Commission. It was not right that Mr Maisamoa had to wait so long for his appeal to be considered. Nevertheless, in all the circumstances, it seems to us that this delay would not justify interference by way of judicial review of the decision of the Public Service Appeal Board. It is clear from reading the minutes of the hearing before the Board that Mr Maisamoa, in part through his lawyer and in part through his own oral submissions had every opportunity to present their case (and, if they considered it appropriate, evidence) in a manner which did that case justice. It is easy to understand how Mr Maisamoa could easily feel aggrieved about the delay. Nevertheless, we are firmly of the view that Singh J was right in concluding that real justice was done by the Public Service Appeal Board to the appeal of Mr Maisamoa and that accordingly Mr Maisamoa had failed to demonstrate an arguable case for judicial review.

56 Finally, to the extent we have failed to deal with the matter already, the Appellant complains (Ground 6) that the judge's decision was not based on merit. It was clearly based on merit in the context - at least - of arguability. In the result, the judge thought by reference to the relevant considerations which the law provides may form the basis of judicial review that the Appellant received a proper, fair hearing at the hands of the Public Service Appeal Board untainted by bias or denial of natural justice and the contrary was not arguable.

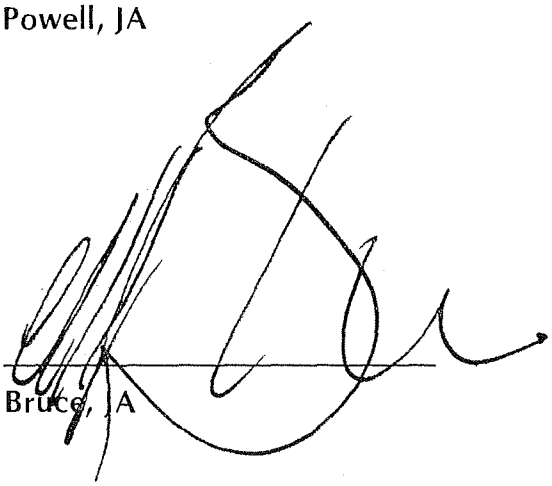
57 It follows from the foregoing that the appeal must be dismissed. Ordinarily, costs would follow the event. However, to mark our regret at the way this matter was handled on appeal on the first day of the hearing by the Respondents in various ways which we have mentioned above, there should be no order as to costs.

58 Accordingly, the order of this court is as follows:

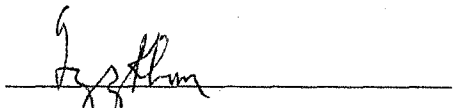
(1) Appeal dismissed;

(2) There be no order as to costs.

Powell, JA



Bruce, JA



Khan, JA

Solicitors:

Appellant in Person
Office of the Attorney General's Chambers, Suva for the First, Second and Third Respondents
Public Service Appeals Board for the Fourth Respondent