

IN THE HIGH COURT OF FIJI

At Suva

Civil Jurisdiction

JUDICIAL REVIEW NO. 0024 OF 2005



IN THE MATTER of an application by
MOHAMMED FERUZ seeking leave to apply
for Judicial Review RHC Order 53 Rule 3(2),
as the Applicant

AND

IN THE MATTER of the decision by the
PUBLIC SERVICE APPEAL BOARD, dated
29th April 2005 allowing the appeal by Mrs.
Seruwaia Savutini against the provisional
appointment of the applicant by the Ministry of
Education, as the Respondent

Between : Public Service Appeal Board

First Respondent

And : Ministry of Education

Second Respondent

Mrs. Seruwaia Savutini

Interested Party

Ex-parte : Mohammed Feroz

Applicant

Counsel : Mr. M.A. Khan for the Applicant
Mr. E. Veretawatini for the First Respondent
Mr. A. Pratap for the Second Respondent

Date of Hearing : 31st May 2006
Date of Judgment : 14th June 2006

JUDGMENT

- [1] The children at Swami Vivekananda College in Nadi have been without a Head of Department in Physical Education, Music, Arts and Crafts (PEMAC) for a long time. There will necessarily be great concern amongst the children, their parents and the teaching staff as to when there will be a permanent Head of Department, PEMAC.
- [2] On the 15th of April 2004 the vacancy for that post was advertised. The applicant in this case, Mohammed Feroz, was successful and he was provisionally appointed. Seruwaia Savutini was one of the applicants. She was not successful. She appealed to the Public Service Appeal Board (PSAB). On 29th of April 2005 the PSAB found that Mohammed Feroz did not meet the Ministry of Education requirements for the post and Mrs. Savutini did.
- [3] Mohammed Feroz sought Judicial Review of this decision and was successful. On the 18th of November 2005 I gave my judgment in this matter. I found (page 13 paragraph 3):

“On the Ministry’s criteria Mohammed Feroz met all the minimum qualifications for the post and was placed with an “advantage” in that he held the PEMAC qualification in all subjects. He should not have been eliminated from contention on the grounds of failure to meet minimum qualifications.”

[4] I concluded the judgment by stating :

"Accordingly I will issue a Writ of Mandamus directing the Public Service Appeal Board to rehear the appeal de novo and on this basis :

The minimum qualifying requirements are to be as stipulated by the Ministry – particularly in respect of :

- (a) The need for five years teaching experience at secondary level and stating precisely what that means and whether that five years refers to experience at secondary level or five years at secondary level since secondary qualification, and
- (b) The Ministry's recognition of Mr. Feroz's qualifications and experience and his promotion assessments, and
- (c) The provision by Mrs. Savutini of the details of her teaching experience which she says meet the Ministry's minimum qualification requirements, particularly concerning the five year secondary teaching requirement."

[5] The Public Service Appeal Board sat again on the 24th of January 2006. They heard Mr. Raikadroka for the appellant, Mrs. Savutini, and Mr. M.A. Khan for the provisional appointee Mr. Feroz. Mr. M. Lal and Mrs. U. Lekanaua were present as the Ministry's representative and Principal Education Officer (Secondary), respectively.

[6] The PSAB found that the appellant failed to meet the "five years competent teaching experience" according to the Ministry of Education's official position (Paragraph 8.7(c)(iii)). Her appeal therefore failed. She has not sought to pursue the matter further.

- [7] The PSAB had originally found that Mohammed Feroz did not meet this qualification. Upon the rehearing, having heard and considered the Ministry's official position, they found that he did meet that requirement.
- [8] However, they found that Mr. Feroz, the provisional appointee had failed to meet the qualification requirement for "(f) potential to advance to higher posts". Having found that neither the appellant nor the provisional appointee had met the minimum requirements they therefore ordered that the post should be re-advertised. This was done and there are now some twelve applicants, including Mr. Feroz.
- [9] Mr. Feroz at first sought committal for contempt of the members of the PSAB for failure to abide by the court's judgment of the 18th November 2005. He now makes application for a court order that he be reinstated as Head of Department for PEMAC at Swami Vivekananda College and that he be given back-pay from January this year. In this judgment I will only address the question of appointment.
- [10] The PSAB based its decision to re-advertise the post on the sole ground that Mohammed Feroz failed to meet the requirement at paragraph 8.5 (f) "potential to advance to higher posts".
- [11] In their original reasoning from the hearing on Tuesday the 26th of April the PSAB had found that Mr. Feroz failed to meet this qualification requirement as "he is still a temporary teacher and has yet to prove that he has the potential to advance to a higher post".
- [12] It must be accepted that was a mis-assessment as the Ministry did not regard Mohammed Feroz as being a temporary teacher. His qualifications were fully recognised.

[13] It is also pertinent to note that in their original conclusions at 8.4(b) they cited paragraph (f) and said "the provisional appointee failed to meet the same". However, at paragraph 8.5, they stated "the Board has decided to allow the appeal. The reason is that the appellant has an edge over the provisional appointee in terms of having five years of competent teaching experience with at least two years at senior forms in relevant subject areas and potential to advance to higher posts".

[14] It is somewhat curious that having found that Mr. Feroz simply did not meet two of the minimum qualification requirements their decision was based on the appellant having "an edge over the provisional appointee".

[15] In my ruling of 18th November 2005 when requiring the Board to rehear the appeal I stated :

"The minimum qualifying requirements are to be stipulated by the Ministry - particularly in respect of :

(a) ...

(b) The Ministry's recognition of Mr. Feroz's qualifications and experience and his promotion assessments, and

(c) ..."

[16] At paragraph 8 of the affidavit of Suliasi Lutubula, Director Secondary with the Ministry, filed on the 29th of August 2005 he states :

"That the Staff Board also assessed the applicant's (Mr. Feroz) suitability for the HOD position and they concluded that he is suitable to be promoted to this position because of his academic

qualification, knowledge and skills, his ability to perform at the level required with good performance."

- [17] The Staff Board's decision was annexed to that paragraph. That document shows an analysis of the various qualifications of the applicants and a reference to their annual confidential reports, in particular their suitability for promotion. All five members of the Board endorsed Mr. Feroz's appointment to the post to the Chief Executive Officer, Education.
- [18] It is a matter of concern as to why the Board should regard Mr. Feroz as not meeting the Ministry's promotion requirements when quite clearly according to the Staff Board's own assessment he had. The face of the documents supports this conclusion.
- [19] Once Mrs. Savutini had been eliminated, because she did not meet the five year teaching requirement at the requisite level, the Board were faced with this position :
- (a) Mr. Feroz had applied for the post and been made the provisional appointee by the Ministry after consideration of his and all the other applicants' qualifications.
 - (b) Mrs. Savutini lodged an appeal which was heard and allowed.
 - (c) According to the Ministry's criteria Mrs. Savutini did not have the minimum teaching experience to apply for the post.
 - (d) There was a provisional appointee and no person challenging that.

- [20] In these circumstances I must therefore consider sections 24 to 27 of the Public Service Act which is entitled "Part V – Public Service Appeal Board", to examine the function of the Board. Is it appellate or review or both ?
- [21] Section 24 deals with the existence of the Board, its members, appointment, etc.
- [22] Section 25(1) states "subject to this section, every employee, other than an employee on probation, may appeal to the Appeal Board under this part against –
- “(a), (b) or (c) ...”
- [23] Section 26 is entitled "procedure on appeal". It gives time limits for lodging of appeals, a prescribed fee and the powers of the Board when hearing an appeal (subsections 1-3). Subsection 4 states "in an appeal the onus of proof rests with the appellant".
- [24] Subsection 10 states "the Appeal Board may allow or disallow an appeal by an employee and the relevant commission must implement the decision". Subsection 12 states "the Appeal Board may, at any time, disallow an appeal without hearing it, or without hearing it further, on the ground that it is frivolous or vexatious or cannot succeed".
- [25] There is nothing in the Act which bestows upon the PSAB a review jurisdiction of a decision of the Ministry. All the provisions of Part V are directed towards the lodging of an appeal, the hearing of an appeal and any orders consequential thereupon. In this case therefore once Mrs. Savutini had no locus standi to appeal there was then nothing before the Board to consider.

- [26] There is another issue to consider. The post was re-advertised on 31st of March 2006. On the 8th of March the PSAB was served with the applicant's Notice of Motion to commit them for failure to comply with my order of the 18th of November. Given those circumstances, it is difficult to understand why the Board allowed the advertisement, which they had directed, to go ahead.
- [27] Eleven people and this applicant have applied for the post. I do understand that the other applicants will be disappointed by the Order in this case. However, they can only have regarded themselves as being one of a number of applicants. Further, when their disappointment is placed against that which Mr. Mohammed Feroz would feel if the whole process was restarted there is nothing which dissuades me from making the orders I do. It is not for Mr. Feroz to explain to the eleven applicants how this state of affairs has come about.
- [28] I must also look to the well-being of the children and the school in making this judgment. Mr. Feroz will be in post in a few days. To restart the entire process with the likelihood of appeal and judicial review thereafter means there will be no Head of PEMAC at Swami Vivekananda for further months and possibly years.
- [29] These are matters of discretion. They support the Order to be made in this case. As a matter of law had readvertisement been required then that would have been ordered.
- [30] Further, were an order not to be made any unsuccessful and disgruntled applicant, who perhaps did not even have all the minimum qualifications could obstruct the appointment process, force an appeal and hope that the PSAB took a different view to that of the Staff Board on some particular qualification. That would not be an acceptable state of affairs.

- [31] The reality is that Mr. Feroz applied for a post, he was the successful applicant and provisional appointee. There was only one appellant against that appointment. She quite simply did not have the standing to make that appeal. Had that been known before the appeal was heard then there would have been nothing for the PSAB to consider and Mr. Feroz would have been working at Swami Vivekananda School now for months. The children, their parents, and the teachers of that school would also have had in place a Head of Department who had the full support of the Staff Board of the Ministry of Education.
- [32] In these circumstances I make an order that Mohammed Feroz is immediately appointed as Head of Department for PEMAC at Swami Vivekananda School. I will leave it to the parties to see if they can resolve the claim for pay from January of this year.
- [33] I order that the Public Service Appeal Board pay the costs of this further application. I will hear the parties as to the basis thereof.

A handwritten signature in black ink, appearing to read 'R.J. Coventry', is written over a horizontal line. The signature is stylized and cursive.

(R.J. Coventry)

JUDGE