IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Judicial Review: HBJ 10 of 2012

BETWEEN	:	**STATE**
A N D	:	**COMMISSIONER OF POLICE**
		Respondent
EX-PARTE	:	**MARIKA TAUVA (also known as) MARIKA TAUFA**
		Applicant
COUNSEL	:	Ms. P. Salele for the Applicant . Mr. D. Nair for the Respondent.
Date of Hearing	:	**25th June, 2015**
Date of Ruling	:	**10th July, 2015**

RULING.

[1] This is an application for leave to apply for judicial review in terms of Order 53 Rule 4(2) of the High Court Rules.

[2] The facts of the case of the applicant are briefly as follows:

The applicant joined the Fiji Police Force on 26th January 1976. He was promoted to the rank of Assistant Superintendent of Police on 8th February 2007 but the appointment was backdated to 18th January 2007 and the Force Routine Order of

23rd February 2007 confirmed the promotion of the applicant. However, the applicant had not been paid the salary of an Assistant Superintendent of Police on the directions of the Disciplinary Committee. It is the position of the applicant that he has been victimized by the Commissioner of Police. While admitting that this application is out of time in terms of Order 53 Rule 4(2) of the High Court Rules the applicant states that the delay was due to the failure of the Commissioner of Police to respond to his requests for clarification on the cancellation of his promotion and he had difficulties in retaining a lawyer because of financial constraints.

[3] While admitting that the applicant made an attempt to contact the Human Resources Department and the Commissioner of Police on this matter, the respondent states that the Commissioner of Police did in fact communicated with the applicant by his letter dated 17th January 2012 [IN 2]. The respondent states further that the Disciplined Services Commission in a meeting held on 30th March 2007 rescinded the promotion of the applicant to the rank of an Assistant Superintendent of Police and the Commission agreed that the applicant could act as an Assistant Superintendent of Police until such time the position is filled through the proper process.

[4] The respondent raised two objections to the application of the applicant. They are:

(i). In view of the provisions of Section 23B of the Administration of Justice (Amendment) Decree No. 14 of 2010 (hereinafter referred to as the **"Decree No. 14 of 2010")** the applicant cannot challenge the decision of the Commissioner of Police before any Court; and

(ii). There is undue delay in making this application.

[5] Section 23B(1)(ii) and (iii) of the Decree reads as follows:

> *No court, tribunal, commission or any other adjudicating body shall have the jurisdiction to accept, hear, or in any other way entertain, any challenges at law, in equity or otherwise (including any application for judicial review) by any person or body, or to entertain or grant remedy to any person or body, in relation to the validity, legality or propriety of any action, decision or order of the Government of the Republic of Fiji, any Minister, the Public Service Commission or any statutory authority or Government entity to:*
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> *(i).* .....
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> *(ii).* *alter or amend the terms and conditions of employment of any person in any public office or public service, including any changes effected through directions issued by the Public Service Commission by any memorandum or circular or through any other directive issued by the Government of the Republic of Fiji, any Minister, the Public Service Commission or any statutory authority or Government entity; or*
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> *(iii).* *any changes to terms of services including the remuneration of any person in public office or public service, statutory authority or Government.*

[6] In terms of section 2(d) of the State Services Decree 2009 "***Public Office***" means an office in "***State Service***" and "***State Service***" means the Public Service, the "***Fiji Police Force***" or the Republic of Fiji Military Force.

[7] In this case the decision sought to be canvassed by the applicant by way of judicial review is a decision taken by the Commissioner of Police who is a Public Officer in terms of the provisions of section 23B (1)(ii) and (iii) of the Decree No. 14 of 2010 read with section 2(d) of the State Services Decree 2009.

[8] Section 23B (1)(ii) and (iii) of the Decree No. 14 of 2010 refers to alterations or amendments of the terms and conditions of employment and any changes to the terms of service. It does not refer to termination of employment.

[9] The applicant relied on the decision in the case of **State vs. Permanent Secretary for Works, Transport and Public Utilities, ex parte Tubunaruarua and Others**[1] in support of the contention that his claim does not come within the purview of section 23B of the Decree No. 14 of 2010, where it was held that the provisions of section 23B of the said Decree does not preclude a person from bringing any proceeding in Court arising out of a decision by the Public Service Commission to terminate any person's employment.

[10] In this case since the applicant is only seeking to challenge the decision of the respondent to demote him from the rank of Assistant Superintendent of Police the provisions of section 23B (1)(ii) and (iii) of the Decree No. 14 of 2010 become applicable.

[11] I am therefore of the view that the application of the applicant seeking enlargement of time to apply for judicial review is misconceived in law and liable to be refused.

[12] The other question for determination is whether there is an undue delay in making this application.

[13] Order 53 Rule 4 of the High Court Rules provides as follows;

> **Subject to the provisions of this rule, where in any case the Court considers that there has been undue delay in making an application for judicial review or in a case to which paragraph (2) applies, the application for leave under Rule 3 is made after the relevant period has expired, the Court may refuse to grant –**
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> ***(a)*** **leave for the making of the application, or**

[1] **[2012] FJHC 985**

(b) **any relief sought on the application,**

if in the opinion of the Court, the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of any person or would be detrimental to good administration.

In the case of an application for an order of certiorari to remove any judgment, order, conviction or other proceeding for the purpose of quashing it, the relevant period for the purpose of paragraph (1) is three months after the date of the proceeding.

[14] Good administration requires that important decisions, on which many other decisions and actions will depend, should not be able to be set aside long after the event by a successful application or claim for judicial review. For this reason the question whether there has been undue delay in bringing of a claim has long being important in applying for judicial review.[2]

[15] In the case of **Maisamoa v. Chief Executive Officer for Health**[3] it was held:

> 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 and Jowell, Judicial Review of Administrative Action 5th Edition Pages 665-666*).

[16] The applicant in his affidavit in support dated 29th June 2012 does not give exact date of the decision he is seeking to challenge by way of judicial review. However, according to the respondent this application has been filed about 15 months from the date of the decision of the respondent to demote him which fact has not been disputed by the applicant. The applicant states in his affidavit that he retained his current solicitor on 20th

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[2] **Administrative Law by Wade and Forsyth 10th Edition at page 561**

[3] **[2008] FJCA 41; ABU 0080.2007S (10th July 2008)**

April 2012 and the lawyer needed time thereafter to peruse the relevant documents and to prepare the papers to be filed in Court. Although the applicant states in his affidavit that his solicitor had to consider volumes of documents to prepare the necessary papers to be filed in Court he has only relied on the ***Force Routine Orders*** (**MT A**) issued by the Commissioner of Police and a copy of the ***Pay Enquiry*** of the applicant (**MT B**) and no other documents have at least been referred to in his affidavit. According to the applicant the solicitors have taken more than two months to consider these documents. On a careful perusal of the documents tendered and the depositions in the affidavit in support of the applicant it cannot reasonably be said that it took such a long time to collect these two documents and to prepare the necessary documents to be filed in Court.

[17] Granting an extension of time to file an application for judicial review is a discretionary remedy but no Court is entitled to exercise this discretion arbitrarily. The Court must always exercise its discretionary power judicially. A party who seeks to invoke the discretionary power of the Court must come to Court with full facts. Whether the delay in coming to Court by way of an application of this nature is reasonable or not depends on the facts of each case.

[18] The learned counsel for the applicant cited the decision in the case of **Avery v. No. 2 Public Service Appeal Board**[4] where it was observed that if the failure to appeal in time due to a mistake of a legal adviser this may be sufficient to justify the Court to grant extension of time. It is up to the person seeking the extension to satisfy the Court that in all circumstances justice of the case requires an extension. The Court has a wide discretion and should have regard to the whole history of the matter, the conduct of the parties, the nature of the litigation, the need of the applicant the effect that granting an extension would have on other persons involved.

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[4] **[1973] 2 NZLR 86 at page 92**

[19] In this case there is no delay on the part of the solicitors. It is the applicant who has taken an unduly long time to retain a solicitor. Such a long and unexplained delay in my view will deprive any party from seeking discretionary relief in a Court of law. Belated applications of this nature, if allowed, would certainly be detrimental to good administration.

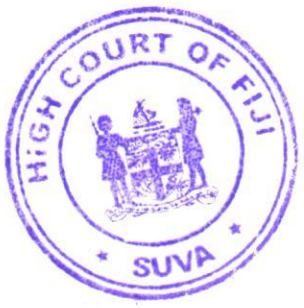
[20] The applicant has failed to depose to in his affidavits certain facts which are very relevant to the question of delay. There are certain factual positions stated in the written submissions filed on behalf of the applicant which cannot be considered as facts deposed to by the applicant himself.

[21] The grounds set out by the applicant in his affidavits explaining the delay in coming to Court is in my view insufficient for the Court to use its discretion in his favour and grant leave to file an application for judicial review.

[22] **Decision.**

1) Application of the applicant for leave to apply for judicial review is refused.

2) I make no order as to costs of this application.



Lyone Seneviratne

JUDGE

10.07.2015