IN THE HIGH COURT AT SUVA
CIVIL JURISDICTION

Judicial Review No. HBJ 02 of 2017

IN THE MATTER of an application by **SALANIETA NAWAQAVOU** for Leave to apply for Judicial Review under Order 53 Rule 3(2) of the High Court Rules of Fiji.

AND

IN THE MATTER of the decision of the Solicitor General dated 7th April 2017 relating for the Termination of the Applicant's employment.

BETWEEN	:	**THE STATE**
AND	:	**THE SOLICITOR-GENERAL**
		FIRST RESPONDENT
AND	:	**PUBLIC SERVICE DISCIPLINARY TRIBUNAL**
		SECOND RESPONDENT
AND	:	**SALANIETA NAWAQAVOU**
		APPLICANT
Coram	:	The Hon. Mr Justice David Alfred
Counsel	:	Ms. L. Raisua, Mr D. Nair with her, for the Applicant Ms. O. Solimailagi for the First Respondent.
Date of Hearing	:	24 January 2018
Date of Decision	:	31 January 2018

DECISION

1. This is the Appellant's Application for Leave to Apply for Judicial Review wherein:

   (1) The Applicant seeks leave to apply out of time for Judicial Review in respect of the irregular decision making process of the Second Respondent (Tribunal) that unduly influenced the First Respondent in his subsequent decision (the Decision) dated 7 April 2017 terminating the Applicant's employment from that date.

   (2) She seeks the following relief or remedies:

      (a) Certiorari to quash the Decision of the First Respondent.

      (b) Mandamus directing the Respondent to reinstate the Applicant to her employment without loss of benefits and entitlements.

      (c) A Declaration that the Decision is tainted with bias, double standard, irrational, erroneous and unreasonable.

      (d) Damages.

      (e) Other relief.

      (f) Costs.

2. The grounds for the Application are as follows:

   (1) The First Respondent was unduly influenced by the irrational recommendation of the Second Defendant and as such the Decision is unlawful and ultra vires.

   (2) The First Respondent failed to accord the natural justice and procedural fairness required under Regulation 22(2) and (3) of the Public Service Regulations 1999, before deciding on the disciplinary action.

   (3) Both Respondents in deciding the harsh penalty, acted unreasonably and unfairly when they failed to take into consideration the penalty of termination was disproportionate as her absence was approved as leave without pay.

   (4) The Respondents failed to provide reasons how the penalty was determined and why it was necessary in view of other penalties short of termination.

(5) The Second Respondent acted unreasonably and unfairly by stating she was paid from public funds for the period of her absence.

(6) The Second Respondent acted unreasonably and unfairly by saying she had neglected her duties when this was not in the Amended Charge laid against her.

(7) The Second Respondent exceeded it's jurisdiction when it recommended termination whereas it was required to opine on the facts found.

(8) The Second Respondent took into account irrelevant consideration and disregarded the following relevant factors:

   (i) The Applicant was not paid any salary for the period of her leave that was approved by the First Respondent as leave without pay.

   (ii) G.O. 716 provided the First Respondent jurisdiction to approve leave without pay which was exercised.

   (iii) The amended charges dated 5 January 2017 did not identify which provision of s.6 of the Public Service Act 1999 (Public Service Code of Conduct) had been breached by the Applicant.

   (iv) The amended charges contained particulars of absence beyond the 12 months within which the charges had to be laid from the act or omission.

   (v) Since the First Respondent had approved her absence as leave without pay her termination breached s.14(1) and (2) of the Constitution as there was no prevailing offence by her.

(9) The irregular decision making process of the Respondents and the Decision is susceptible to judicial review, as there is no further right of remedy.

3. The First Respondent in his Notice of Opposition states as follows:

   (a) The Application is filed out of time and with undue delay.

   (b) There is no arguable case as he has the power to remove a person from the Office of the Attorney-General under s.116 and to terminate his employment under s.163(5) of the Constitution.

(c) The First Respondent made the Decision after necessary investigation was conducted, and pursuant to the powers provided in the Constitution.

(d) The First Respondent is authorized to institute disciplinary action against the Applicant under s.116 of the Constitution.

(e) The Second Respondent is authorized to hear and determine disciplinary action instituted by the Solicitor General (SG) against a person employed in the Office of the Attorney General under s.120 (9) of the Constitution.

(f) There is a lack of an arguable ground provided by the Applicant that warrants a judicial review.

Wherefore the (First) Respondent prays that the Application be dismissed.

4. At the hearing of the Application, the Second Respondent (Tribunal) was represented by its officer, Ms M Ravouvou who took no part in the proceedings.

5. Counsel for the Applicant submitted that there was an arguable case as the various periods of leave were approved subsequently as leave without pay. The Tribunal did not have power to recommend a dismissal, which they did, and the SG followed that recommendations. The charges were filed over 5 years later at the Tribunal. The delay of 1 month and 3 days was due to the Applicant trying to get the assistance of a lawyer. Counsel concluded by saying because the SG approved the leave there can be no charge of being absent without leave.

6. Counsel for the First Respondent (SG) then submitted. She said there was no arguable case. The only charge before the Tribunal was the excessive leave taken by the Applicant between October 2013 and December 2014. S. 116(11) of the Constitution gave the SG power to institute disciplinary action. The SG was merely formalizing the leave she had taken which she had not applied for earlier and which she was not entitled to, by approving the same as leave without pay. The SG was not approving any annual leave

nor any sick leave. She was not entitled to any leave at all – 23 instances in just over 1 year.

7. Counsel said the 1 month delay was not excusable as she had all the documents prior to filing the Application. She did not depose that she was looking for a lawyer. Counsel also said that Regulation 26 had been repeated with effect from 1 December 2016 well before the Tribunal's decision on 7 April 2017. The SG had the right under Civil Service (General) Regulations 1999, regulation 22 (2) to terminate the employment of the Applicant as that was recommended by the Tribunal.

8. Counsel for the Applicant in her reply said that because the SG had formalized the leave and the Applicant had foregone her wages there was no offence on her part before the Tribunal.

9. At the outset I shall deal with the issue of delay, In my considered opinion a delay of a mere 1 month and 3 days cannot be an impediment to the Applicant seeking judicial redress of a perceived wrong done to her. The Courts exist for that precise purpose. Where for instance time lines are set for the filing and serving of, say, a notice of appeal, the proposed appellant will normally be granted an extension of time by the Court to do so.

10. I shall therefore grant the Applicant an extension of time for making this application for Judicial Review out of time as I consider her explanation as good reason. I do not consider this will be likely to cause any hardship or prejudice to the Respondents. Nor do I consider that this extension per se will cause any deteriment to good administration. Indeed, the Counsel for the SG did not provide any affirmative evidence of any detriment or harm to good administration if I were to grant an extension. (See The Supreme Court Practice 1995 Vol 1 (The White Book) Order 53)

11. According to the White Book, the purpose for the requirement of leave is:

    (a) To eliminate at an early state any application which is frivolous or vexatious or hopeless and

    (b) To ensure that an application is only allowed to proceed to a substantive hearing if the Court is satisfied that there is a case fit for further consideration.

12. The nub of the matter is to be found in para 4.2.7 of the Applicant's Written Submission dated 24 January 2018. I can paraphrase this as: The SG's Decision is amendable to judicial review because (i) it was unduly influenced by the recommendation of the Tribunal which had exceeded its jurisdiction in making such recommendation, and (ii) the Decision was improper, irrational, unreasonable and unjustified.

13. To the above matrix I shall have to apply the test which is whether I am satisfied that there is a case fit for further investigation at a full inter-partes hearing of a substantive application for judicial review (see R. v. Secretary of State for the Home Department, ex p. Rukshanda Begum [1990] C.O.D. 107, CA).

14. As I see it, from all the material and evidence before me, the Applicant's real grievance are twofold. First that the Tribunal had no power to recommend dismissal (The ultra vires argument). And, second the Decision was unreasonable (the Wednesbury principle).

15. I am relying on the following provisions of the Constitution for the decision I am reaching. Hereafter sections refer to sections of the Constitution.

16. The Tribunal was set up by s. 120(1) and by sub- s(9) it has the function to hear and determine disciplinary action instituted by (b) the SG against any person employed in his ministry or office.

17. Section 116(7) lays down that the SG has the same status as that of a permanent secretary and shall be responsible as the Permanent Secretary for the Office of the Attorney-General.

18. Section 127(3) provides that the permanent secretary is responsible to the Minister "for the efficient, effective and economical management of the ministry or any department under the ministry". I opine that the above entails a permanent secretary ensuring all staff are present during office hours to provide efficient and effective service to the public.

19. Section 127(7) states the permanent secretary "shall have the authority to appoint, remove and institute disciplinary action against all staff..................".

20. In her oral submission the Counsel for the Applicant said the Tribunal did not have the power to recommend a dismissal under Regulation 26(3) of the (Civil Service (Discipline) Regulations 2009.

21. However, I note that the above regulation 26 was deleted by regulation 33(j) of the Revised Edition of the Laws (Consequential Amendments) Regulations 2016 which came into force on 1 December 2016.

22. Therefore, when the Tribunal recommended (directed) on 7 April 2017 that the Applicant's services be terminated, it was perfectly competent to do so under regulation 22(1) and (a) of the Civil Service (General) Regulations 1999.

23. And, when on the same day and as a consequence of the above directive the SG terminated her employment with the Office of the Attorney-General, he was obliged to do so by regulation 22(2) of the above Regulations, which provides that "A permanent secretary must implement the penalty that the Public Service Disciplinary Tribunal directs the permanent secretary to implement under sub-regulation (1)".

24. The word "must" above is defined in the Oxford Advanced Dictionary of Current English as "expressing an immediate or future obligation or necessity".

25. In other words the SG had no discretion; he had no choice in the matter; he had no other option; he had to act as directed by the Tribunal.

26. In the event, I am unable to see any arguable case for the Applicant to proceed any further. The Tribunal had the legal power to direct the implementation of a penalty viz. the Applicant's employment be terminated. The SG had the legal obligation to implement that penalty.

27. Consequently the Applicant's challenge against the penalty directed by the Tribunal and the SG's implementation of that penalty must necessarily fail, as there can be no question of ultra vires here or of unreasonablemess.

28. In the result leave to move for judicial review is hereby refused, the relief and remedies sought are not granted and I shall order each party to bear their own costs.

Delivered at Suva this 31st day of January 2018.

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David Alfred
JUDGE
High Court of Fiji