**IN THE HIGH COURT OF FIJI**
**AT SUVA**
**CIVIL JURISDICTION**

**Judicial Review No.: HBJ 4 of 20**

**IN THE MATTER** of an application by **ARVIND KUMAR** for Judicial Review under Order 53 of the High Court Rules of Fiji.

**AND**

**IN THE MATTER** of the decision made by the Permanent Secretary for Education, Heritage and Arts dated 11 March, 2020 terminating the employment of the applicant effective from the same date.

**BETWEEN** : **THE STATE**

**AND**: **PERMANENT SECRETARY FOR EDUCATION, HERITAGE AND ARTS**

**RESPONDENT**

**EX-PARTE**: **ARVIND KUMAR**

**APPLICANT**

**Counsel** : **Applicant: Mr Nair.D**

: **Respondent: Ms Solimailagi.O & Mr Ali.M**

**Date of Hearing** : **01.06.2020**

**Date of Judgment** : **07.08.2020**

## JUDGMENT

### INTRODUCTION

1. Applicant is seeking judicial review regarding the dismissal of his services from the position he held under employment contract with the Ministry of Education (MOE). Respondent's main objections to this are two prone. Firstly, they contend that since the Applicant was under an employment contract, the relationship between the parties were purely master and servant, in the realms of private law, hence judicial review cannot be sought. Next contention was, that the Applicant could have sought redress for termination under Section 3(1) of Employment Relations Act 1997 (ERA). As much as employment

in the government entity itself would not guarantee redress through, judicial review, employment through a contract *ipso facto* will not deny such redress. It will depend on the issues of determination at judicial reviews. Order 53 rule 3(6) of High Court Rules 1988, states that when there is a right of appeal against the decision sought to quash, judicial review is not precluded. Instead, court can adjourn the matter till the appeal is determined or time for such appeal expired. So, availability of alternative remedy itself, is not a reason to refuse leave. Applicant had fulfilled the procedural requirements in terms of High Court Rules 1988, and there are statutory '*underpinnings*' that involve termination of the employment of the Applicant that can only be determined at hearing of judicial review. Such determination cannot be dealt under ERA, as that is not the scope of ERA. There is nothing in ERA that precludes judicial review (*see Davy v Spelthorne BC*[1984] AC 262, Per Lord Wilberforce)

**FACTS**

2. The Applicant entered in to a three year contract of service with the Permanent Secretary for MOE from 3 .12. 2018.

3. In September, 2019, the MOE, received a complaint from one of its officers against the Applicant, of inappropriate behavior while he was working at MOE.

4. In or about October 2019, a preliminary report of the allegation was prepared. It contained written statements from the female staff. Upon the finding of the preliminary report, an investigation into the allegation was conducted, in accordance with the Fijian Civil Service Discipline Guidelines.

5. By a letter dated 30.9. 2019, the Applicant was suspended from his position with full salary, while the investigations were going on.

6. This was to allow MOE, to carry out an investigation into the allegations against him, without his interference or to provide an environment conducive for collection of evidence relating to the allegation.

7. An investigation panel was appointed to carry out an investigation into the allegations; and after carrying out its investigation, the panel submitted its investigation report to MOE.

8. Applicant on 23.12.2019 had made a statement relating to the allegations made against him as part of the said investigation.

9. On 9.01.2020, the Applicant was issued a show cause letter and on 13.01.2020, the Applicant responded to the show cause notice and stated that the allegations against him were fabricated and it was an action of section of employees who were subjected to disciplinary action by him as part of his official duty.

10. On 11.3.2020, the Applicant, was issued with a letter that terminated his employment with MOE. It stated that Applicant was summarily dismissed in terms of Clause 10 of the employment contract.

**ANALYSIS**

11. Respondent did not allege any deficiency in this application relating to the procedural requirements contained in Order 53 rule 3 of the High Court Rules 1988.

12. The Applicant having sufficient interest in the matter as his employment with MOE was terminated by the decision sought to review, this issue is dealt in detail later.

13. Main objections for the grant of leave for judicial review are:

    a. The decision subjected to judicial review arose out of an employment contract between the Respondent and Applicant, which was private in nature.
    b. Availability of alternative remedy in terms of ERA and failure to exercise such remedy.

14. The Respondent relied on the case of *Ministry and the Permanent Secretary for the Ministry of Education and the Attorney General v Amrit Prakash (unreported) Court of Appeal Fiji Islands Case Number 0032 of 2009,*

> "The principles invoking public law remedy in relation to employment are well settled. An employee of a public authority is entitled to invoke a public law remedy in relation to his employment depends on whether there were special **statutory restrictions governing the employment or whether there are Regulations or statutory underpinning** to the conditions of employment. If not the relationship between the employee and the public authority **is only a master and servant relationship** and it is governed by the respective contract of employment. In this instant case the **Respondent's employment is not made under any statutory provision or governed by any regulation**. He was appointed as a Primary Teacher by the Ministry of Education with the concurrence of the Public Service Commission in terms of the letter of appointment issued to him. The Respondent has entered into a contract of employment in terms of the letter of appointment. Any breach of the terms and conditions stipulated in the letter of appointment would fall under realm of private law. Hence I reject the submission of the Appellants that the remedy that is available to the Respondent in the given circumstances is by way of judicial review." (emphasis added)

15. So, what is meant by *statutory underpinning* or *statutory restrictions* in the said judgment and whether such statutory requirements are to be interpreted, in this dismissal determines the first objection by the Respondents. This is not as straight forward as Respondent's contend. Though the starting point is employment contract,

that itself is not determinative for refusal of leave. It depends on 'statutory restrictions or whether there were Regulations or 'statutory underpinnings'.

16. Applicant's employment with MOE is primarily dependent on the employment contract entered between the Applicant and the Respondent, but one cannot stop at that point and refuse to grant leave for judicial review.

17. According to the Respondent, Applicant was summarily dismissed in terms of Clause 10 of the said contract. This is the provision that deals with summary dismissal that comes in to operation with immediate effect.

18. This is the most drastic provision contained in employment contract as relating to termination hence checks and balances are equally paramount in the exercise of such provision.

19. Application of this clause 10 in the employment contract, can be only after '*reasonable inquiries*' by the Respondent.

20. According to Respondent, the reasonable inquiries, were conducted in terms of Fijian Civil Service Discipline Guideline issued in terms of Sections 123(h) and 127(7) of the Constitution of the Republic of Fiji.

21. This procedure can be subjected to judicial review in terms of the above-mentioned provisions of law.

22. What can be considered as '*misconduct*' as stated in clause 10 of the said employment contract is not specifically dealt either in the said contract of employment and or in the said Guidelines stated above.

23. So the interpretation of Clause 10 and word 'misconduct' is not a private issue between a master and servant as contended by Respondent, as it would invariably dealt under said Guideline issued in terms of the provisions contained in the Constitution of the Republic of Fiji.

24. Court of Appeal decision in *Palani v Fiji Electricity Authority [1997] fjca 21: ABU 0028.96 (18 July 1997)* held that judicial review is not applicable in a strict master and servant relationship, based on a private contract of employment. That appeal arose out of an application for judicial review *inter alia* seeking to quash the decision to suspend and dismissal of employees of a government entity (FEA). It was held,

> "In our view none of these matters injects the necessary element of public law into the master and servant relationship. **Walsh's case makes it clear that the mere fact of Mr. Palani being employed by a public statutory authority is not sufficient.** The fact that the second appellant is a trade union does not appear to us

to bear upon the question and the only relevance of the Trade disputes Act (Cap. 97) appears to be that the collective agreement was registered pursuant to s.34 and thus imported the provisions of the collective agreement into Mr. Palani's contract of employment with the Authority. Further we do not see that the mode of appointment of the Board of the Authority bears upon the question."

25. Court of the Appeal in *Palani* (supra) considered and applied ***R. V. East Berkshire Health Authority, ex parte Walsh*** *(1984) 3 All E.R. 425* , held

"In R. V. East Berkshire Health Authority, ex parte Walsh (1984) 3 All E.R. 425 it was held by the Court of Appeal that whether a dismissal from employment by a public authority was subject to public law remedies depended on whether there were special statutory restrictions on dismissal which underpinned the employee's position and not on the fact of employment by a public authority per se or the employee's seniority or the interests of the public in the functioning of the authority. Sir John Donaldson M.R. in his judgment discussed the question of statutory underpinning in relation to three of the most well known cases in this area, Vine v. National Dock Labour Board (1956) 3 All E.R. 939, Ridge v. Baldwin (1963) 2 All E.R. 66 and Malloch v. Aberdeen Corp (1971) 2 All E.R. 1278, and said at p. 430:

"In all three cases **there was a special statutory provision bearing directly on the right of a public authority to dismiss the plaintiff.** In Vine's case the employment was under the statutory dock labour scheme and the issue concerned the statutory power to dismissal was conferred by statute (s. 191(4) of the Municipal Corporations Act 1882). In Malloch's case again it was statutory (s.3 of the Public Schools (Scotland) Teachers Act 1882). As Lord Wilberforce said, **it is the existence of these statutory provisions which injects the element of public law necessary in this context to attract the remedies of administrative law**. Employment by a public authority does not per se inject any element of public law. Nor does the fact that the employee is in a 'higher grade' or is an 'officer'. This only makes it more likely that there will be special statutory restrictions on dismissal or other underpinning and not the seniority which injects the element of public law. Still less can I find any warrant for equating public law with the interest of the public. If the public through Parliament gives effect to that interest by means of statutory provisions, that is quite different, but the interest of the public per se is not sufficient." *(emphasis added)*

26. If respondent's contention is admitted any dismissal can be made in terms of Clause 10 and the aggrieved party cannot seek redress by way of judicial review even in denial of natural justice. What is *reasonable inquiry* in terms of the said Clause 10 of the employment contract is an exercise of discretion and that was subjected to Disciplinary Guidelines issued in terms of Sections 123(h) and 127(7) of the Constitutions of the Republic of Fiji. This can be done only upon finding of 'guilty ***of misconduct***' under said clause. The application of summary dismissal needs to be

applied in reasonable manner by the Respondent, which can be subjected to judicial review.

27. The ***Walsh*** (supra) case was applied by Court of Appeal in *Permanent Secretary for Education v Nair [2011] FJCA 2; ABU0061.2008 (5 January 2011).* What is paramount is **not the type of employment**, but the **mode of exercise of discretion by the authority to dismissal**.

28. Having a contract was not determinative as contended by the Respondent. Any position in the government can be subjected to a contract, but that alone will not exclude judicial review.

29. If there is no clear demarcation of only a master and servant relationship in the employment contract, it is not safe to deny judicial review. In my judgment on the material before me at this stage, Applicant is entitled for leave to judicial review.

30. It is undisputed that the Applicant was a civil servant employed by MOE under a contract. But said contract under clause 10 allowed summary dismissal for 'misconduct' after 'reasonable inquiry' by the Respondent.

31. What is reasonable inquiry in terms of the said employment contract cannot be determined without considering public law element as this vests with a public authority discretion, what is reasonable.

32. Respondent had also relied on '2008 National Policy on Sexual Harassment in the Workplace' developed in consultations with the tripartite social partners and other stakeholders.

33. Application of such Policies and what is reasonable inquiry are public law elements. The application of Clause 10 for a 'misconduct' so as to constitute a summary dismissal cannot be considered as purely a private dispute that can be determined by contract between master and servant.

34. Applicant contended that he was not given an opportunity to present his defence in Public Service Disciplinary Tribunal (Tribunal). What type of allegations or disputes are referred to such a Tribunal and why the Applicant was summarily dismissed denying such an opportunity was also raised. These are matters that can be dealt at the hearing of judicial review, and not suitable to deal at this stage.

35. This also involves discretionary power of the Respondent in terms of Civil Service (General) Regulations 1999 Regulation 22 and if a '*disciplinary action*' is instituted against an employee it is the said Tribunal that needs to be satisfied so as to recommend termination or such other action.

36. Civil Service (General) Regulations 1999 were formulated in terms of part 3 of the Civil Service Act 1999. Interpretation Act 1967 applies to interpretation of the said Regulations.

37. Applicant relies on said Regulations and he was deprived of disciplinary procedure through said Tribunal established under law as he was dismissed summarily for misconduct in terms of clause 10 of the employment contract.

38. So, I refuse the contention for the Respondents that Applicant's termination cannot be challenged though judicial review as the dismissal was in terms of clause 10 of the employment contract.

39. Next issue is whether there is alternative remedy. It is admitted that since the Applicant was under an employment contract he could have sought relief from Employment Relations Tribunal in terms of Section 3 of ERA.

40. Section 3 of ERA states:

> "(1) Subject to subsection (2), this Act applies to all employers and workers in workplaces in Fiji, including the Government, other Government entities, local authorities, statutory authorities and the sugar industry.
>
> (2) This Act does not apply to members of the Republic of Fiji Military Forces, the Fiji Police Force and Fiji Corrections Service."

41. Section 188(4) of the ERA allows the Applicant to file or lodge an employment '*grievance*' with the Employment Relations Tribunal or Employment Relations Court, pursuant to Parts 13 and 20 of the said Act. Employment '*grievances*' include dispute or rights involving dismissal or termination of workers, pursuant to section 185 of the ERA.

42. Section 111(1) of the Employment Relations (under Part 13) states:

> "A worker who believes that he or she has an employment grievance may pursue the grievance procedure in person, and may be assisted by a representative."

43. But, above provisions are not overlapping and or substitute for judicial review. The scope of judicial review is not dealt in the above provisions, hence cannot be considered as adequate alternative remedy to judicial review.

44. Order 53 rule 3(6) of High Court Rules 1988 states that when the judicial review relates to a quashing of a decision that can be appealed such application for leave can be determined one time period for appeal is expired or after determination of the said appeal. So an alternative remedy itself is not a complete exclusion of judicial review.

45. Alternative remedy should also be adequate for denial of judicial review. Having an alternative remedy itself is not sufficient, to exercise discretion of the court for refusal of leave.

46. Next issue is what is an arguable case and whether Applicant had established an arguable case for judicial review.

47. Applicant is challenging the determination of the Respondent to terminate him, summarily so as to denial of due process of a disciplinary action in terms of Regulation 22 by Public Service Disciplinary Tribunal.

48. Respondent had terminated the Applicant summarily after reasonable inquiry as to the alleged 'misconduct' in terms of clause 10 of the employment contract read with Fijian Civil Service Discipline Guidelines and '2008 National Policy on Sexual Harassment in Workplace'.

49. The statutory requirement for grant of leave for judicial review is expressly set out in Order 53 Rule 3 of the High Court Rules 1988. Order 53 Rule 3(5) of the High Court Rules states:

> "(5) The Court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates."

50. Sufficient interest can be either due to direct consequence such as termination of employment or through 'public' interest, which is not the issue in this Application.

51. In ***Livai Lila Matalulu & Anor v Director of Public Prosecutions*** CBV0002 OF 1999s (17 April 2003) the full Supreme Court in relation to the factors to be taken into account when considering such applications, stated as follows at page 25:-

> "The Judge granting leave to issue judicial review proceedings has discretion, once a sufficient interest is shown by the applicant. That discretion has to be informed by the evident purpose of Order 53. It is not an occasion for a trial of issues in the proposed proceedings. The judge is entitled to have regard to a variety of factors relevant to the purpose of the rule. These include:
>
> 1. Whether the proposed application is frivolous or vexatious or an abuse of the process of the Court.
> 2. Whether the application discloses arguable grounds for review based upon facts supported by affidavit.
> 3. Whether the application would serve any useful purpose, eg whether the question has become moot.

4. Whether there is an obvious alternative remedy, such as administrative review or appeal on the merits, which has not been exhausted by the applicant.
5. Whether a restrictive approach to the grant of leave is warranted because the decision is one which is amenable to only limited judicial review.

The question whether there are arguable grounds for review is not to be determined by the resolution of contestable issues of law. But where a proposed application for judicial review depends upon grounds involving assertions of law or fact which are manifestly untenable, then leave should not be granted."

52. Applicant have sufficient interest in this Application as stated earlier in this judgment and application is not frivolous or an abuse of process.

## CONCLUSION

53. Applicant was employed by MOE under an employment contract. He was terminated summarily in terms of clause 10 of the said contract. Respondent was required to conduct a reasonable inquiry and also finds him 'guilty of misconduct' in terms of the said clause. Applicant was not subjected to disciplinary action in terms of Regulation 22 of Civil Service (General) Regulations 1999 which was formulated in terms of part 3 of the Civil Service Act 1999. Interpretation Act 1967 applies for interpretation of that. His dismissal also involves discretion of Respondent and application of Disciplinary Guidelines issued in terms of Sections 123(h) and 127(7) of the Constitutions of the Republic of Fiji. In my mind the application for judicial review contains arguable case to grant leave. Parties to bear their own costs for this application.

## FINAL ORDER

a. Applicant is granted leave to apply for judicial review in respect of decision dated 11.3.2020.
b. Parties to bear their own costs for this application seeking leave.

**Dated at Suva this 7th day of August, 2020.**

HIGH COURT OF FIJI SUVA

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**Justice Deepthi Amaratunga**
**High Court, Suva**