IN THE HIGH COURT OF KIRIBATI 2012

CIVIL CASE NO. 129 OF 2011

BETWEEN	IOTEBA NAON	APPLICANT
	AND	
	OTINTAI HOTEL BOARD OF DIRECTIONS	RESPONDENT

Before: Hon Chief Justice Sir John Muria

26 October 2012

Mr Raweita Beniata for Applicant
Mr Birimaka Tekanene for Respondent

JUDGMENT

Muria CJ: The applicant, Ioteba Naon, seeks leave to bring certiorari proceedings against the respondent, Otintaai Hotel Board of Directors, in respect of the latter's decision to transfer him from the Account Department to the Food and Beverages Department. However, before he can do that, the applicant requires extension of time first to seek leave since he is one year out of time as required by Rule 3 of O.61 of the *High Court Rules*. The applicant now seeks the extension of time required.

In its indulgence, the Court has permitted the applicant to argue his case for leave to institute certiorari proceedings so that if extension of time is granted, leave can also be determined at the same time. This judgment is on the two issues mentioned.

BRIEF BACKGROUND

The applicant was and is still employed by the respondent, Otintaai Hotel in Bikenibeu, South Tarawa. The affidavits filed by both parties show that the applicant has been employed in the Otintaai since 1993 serving in various other Sections. In December 2009 the applicant was transferred to the Account Section and in September 2010 he was transferred back to the Food and Beverages Section where he was once posted.

Following some difficulties, the Hotel was facing, a Task Force was set up to investigate and report to the respondent Board. The Task Force conducted its investigation. It interviewed the staff of the Hotel including those in the Account Section. The applicant was one of those interviewed as confirmed by his own affidavit and that of Taiaki Irata. The Task Force made its Report to the respondent Board recommending, among other things, that the applicant be transferred to "any appropriate section that he could fit into" within the Otintaai Hotel establishment.

On 15 September 2010, the respondent transferred the applicant to the Food and Beverages Section, the Section in which he once served. He is still employed in that Section at the present. His salary has not been affected by the transfer.

WHETHER DECISION OF RESPONDENT'S BOARD SUBJECT TO JUDICIAL REVIEW

It is not disputed that the respondent Hotel is a Government owned hotel under the Otintaai Hotel Limited, a Government owned company, incorporated under the Companies Ordinance (Cap 10A). Its Board of Directors are appointed by the Minister responsible (Ministry of Communications, Transport and Tourism Development). At the head of

the organisation structure of the hotel is also the Minister of Communications, Transport and Tourism Development.

The learned Solicitor General, Mr Tekanene, contended that the respondent is a private limited company. It is a separate legal entity governed by its Articles of Association and operates under the directorship of its Board of Directors. It has it's own terms and conditions of service, the Hotel Conditions of Services. Thus submitted the learned Solicitor General that the decisions of the respondent's Board of Directors are management decisions and as such, they are not amenable to judicial review. In support of the respondent's argument, the learned Solicitor General referred to the case of *Neat Domestic Trading Pty Limited –v- AWB Limited & Another* (2003) 216 CLR 277.

The respondent, Australian Wheat Board (AWB), in the Neat Domestic Trading case, is a statutory corporation that controls the marketing and export of wheat in Australia. The second respondent, AWBI (International) Limited (AWBI) is a wholly subsidiary of AWB Limited. The appellant is a domestic and international grain trader. The appellant previously applied for and was granted permits to export wheat in bulk. Later it applied for permits to export durum wheat to Italy and Morocco, the respondent AWBI declined to give its approval. On appeal to the High Court of Australia, it was held that the respondent's decision was not open to judicial review. AWBI is a company (not statutory corporation like AWB) with a private character pursuing its commercial interests and as such no public law obligations can be imposed on it.

In the present case, the respondent, although Government owned, is a private limited company. Its governing body is the Board of Directors who direct the company as to its management and policies. Undoubtedly one of its main objectives is to pursue its commercial interest with a view to making profits. In this regard I accept the contention by the learned

Solicitor General that the decision of the respondent's Board of Directors was made to serve the best interest of the Hotel and of its commercial interest.

However, in my view, the fact that the respondent possesses character of private nature and engaging in commercial interest, are insufficient to exempt it from the judicial review jurisdiction of the Court. This is so, especially in a case such as the present one where the overall control of the respondent is part of an integral system, that is, the Government operation which has a public law character and sanctioned by public law. See *R –v- Panel on Takeovers and Mergers ex parte Datafin PLC & Another* [1987] 1 All ER 564.

Mr Beniata's argument is apt in this regard when he submitted that the respondent is part of the Government's set up, integrating it into the Government's framework as demonstrated by the respondent's organizational structure. The structure shows that appointments of members of the Board of Directors are done by the Minister of Communications, Transport and Tourism Development and that at the Head of the structure is the Minister of Communications, Transport and Tourism Development. In addition, since the respondent is wholly owned by the Government, its financial accounts are reviewed by the Government through the Public Accounts Committee (PAC). The respondent's Conditions of Service for its employees provide that on matters not covered by the respondent's Conditions of Service, the Government National Conditions of Service shall apply.

The above factors clearly bring the respondent's Board of Directors into the realm of a public body whose decisions are amenable to judicial review.

WHETHER EXTENSION OF TIME SHOULD BE GRANTED

The respondent's decision to transfer the applicant from the Account Section to the Food and Beverages Section was contained in a letter dated 15 September 2010 and communicated to the applicant. The decision was made on 13 September 2010. The application seeking judicial review of the respondent's decision was filed on 12 September 2011, one year after the decision was made.

Mr Beniata of Counsel for the applicant submitted that there has been no undue delay in this case on the part of the applicant to bring the matter to the court. In support of his submission, Counsel referred to the various correspondence over the matter. These include the letter written by the applicant to the Hotel on 16 September 2010 to review its decision. He wrote another letter on 17 September 2010 to the Hotel asking the Hotel to reconsider its decision. The Hotel replied to the applicant's letters on 18 September 2010 maintaining the Board's decision.

Subsequently, the applicant approached his Members of Parliament, Banuera Berina MP who wrote two letters on behalf of the applicant on 11 October 2010 and 6 September 2010, and Teburoro Tito MP who wrote a letter on his behalf on 25 January 2011. When those letters produced no results, the applicant approached the Office of the People's Lawyer and sought legal advice from the Assistant People's Lawyer who is the applicant's present Counsel.

Mr Beniata wrote on 27 April 2011 to the Hotel's General Manager (Acting) and copied to the Members of the respondent Board, seeking the reinstatement of the applicant to his previous position in the Account Section. There was no response by the respondent to that letter. On 12 September 2011 the application was filed in this Court.

There can be no argument that the applicant was out of time by one year before bringing his case to Court. The question is whether he should be given indulgence by the Court and permit him to bring his case outside the time limit laid down in Rule 3 of O.61 of the *High Court Rules*. This rule is mandatory:

"Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months" after the date of the order, judgment or proceeding complained of. The applicant had six months to apply.

The general discretion of the court to enlarge time is contained in O.64 r5 of the *High Court Rules*. It must be observed that Rule 5 of O.64 is subject to other Rules, one of which is O.61 r3. It is for this reason that an applicant, seeking the Court to invoke its discretionary power, must satisfy the Court why it should exercise it in his favour.

Mr Tekanene of Counsel for the respondent submitted that the blame for the delay in this case is put on the respondent, yet the applicant chose not to bring the matter to Court within the six months as required by the *Rules*. The main reason for challenging the respondent's decision was and still is, according to the applicant, the alleged breach of the rule of natural justice. The applicant stated that he had been denied the right to be heard or to tell his story before he was transferred from the Account Section to the Food and Beverages Section. That was his complaint immediately after the decision to transfer him was made and it is still his ground for challenging the respondent's decision.

In my view it makes very little sense and bears no justification whatsoever to wait one (1) year before bringing the complaint to Court for breach of

the rule of natural justice when all along, that was the ground for complaint against the respondent's decision.

It may well be that the respondent had been slow or uncooperative in responding to the letters from or on behalf of the applicant. But the lack of responses to those letters cannot confer on the applicant an excuse for failing to comply with a six (6) months time limit given under the *Rules*. The responses to the letters might be more relevant to beefing-up the arguments in support of the applicant's case in the course of the proceedings.

In my view what the applicant could have done was, having armed with the allegation of denial of natural justice, filed the complaint immediately in Court. He could then set about writing to the respondent requesting the information needed to support his case.

This is not a case where the grounds of complaint against the respondent's decision could only be ascertained from the document (Task Force Report) and so that Report was vital to ground the applicant's case. As already mentioned, the ground for challenging the respondent's decision was the alleged breach of the rule of natural justice. There is nothing to prevent the applicant from immediately running to the Court and file his case on the ground of denial of right to be heard.

The applicant cannot rely on the lack of cooperation from the respondent in this case. He was not dismissed from his employment. He was simply being transferred from one department to the other within the Hotel. All along, he was in the company of his employer, the respondent. Yet he allowed the six months to go by without a gripe.

He may well argue that he was not sitting idle, as was argued by Mr Beniata on his behalf. His actions in writing and waiting for the

responses from the respondent did not and cannot help him cure the defect of not complying with the time limit set by the *Rules*. It would not be proper to grant an extension of time to the applicant in this case.

Even if the Court were to stretch its indulgence and permit the applicant an extension of time, I would have refused leave to issue certiorari in this case. In the present case, in my view, it would not be just to grant leave to the applicant for two reasons. First, the delay in this case of bringing the complaint to Court is inexcusable. The applicant was, and still is, in the employment of his employer, the respondent, and thus has been closely in touch with the respondent. This is not a case of someone who had been dismissed and left the employment and being out of touch.

Secondly, the applicant was not dismissed. He was simply transferred from the Accounts Section to the Food and Beverages Section in the Hotel with no loss of benefits. His salary remained on the same level. He is still in the employment of the respondent. From his affidavit of 24 September 2012, paragraph 25, the applicant is seeking to be put back into the Accounts Section. That I feel is a matter for the respondent's management. There is no evidence to suggest that it was wrong to transfer the applicant from Accounts Department to the Food and Beverages Department.

The applicant complains of unfairness. The notion of fairness is relative to the circumstances of the case at hand. It is not carved in tablets of stone as pointed out by Lord Steyn in *Lloyd –v- MacMahon* [1987] AC 625. In this case, applying the notion of fairness to the circumstances of the case, in my view, would favour the exercise of the Court's discretion refusing leave.

For all the above reasons, the applicant's request for extension of time to apply for leave to bring certiorari proceedings is refused. Leave having been argued, it is also refused.

Dated the 28th day of March 2013

SIR JOHN MURIA
Chief Justice