IN THE COURT OF APPEAL, AT SUVA
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO.ABU0058 OF 1997S
(High Court Civil Action No.311 of 1992/S)

BETWEEN:

RAM PRASAD F/N RAM RATTAN

Appellant

AND:

THE ATTORNEY-GENERAL OF FIJI

Respondent

Coram: **The Hon. Sir Moti Tikaram, President**
The Hon. Justice I.R. Thompson, Justice of Appeal
The Hon. Sir David Tompkins, Justice of Appeal

Hearing: **Tuesday, 24 August 1999, Suva**

Counsel: **Mr. T. Bukarao for the Appellant**
Mr. D. Singh for the Respondent

Date of Judgment: **Friday, 27 August 1999**

JUDGMENT OF THE COURT

The appellant, by proceedings commenced by writ of summons and statement of claim, brought an action for wrongful dismissal following the termination of his employment at the Ministry of Primary Industries. The statement of claim was subsequently amended. By agreement between counsel, the following questions were submitted for determination as preliminary points.

1. Whether the appellant being a civil servant at the time of dismissal ought to have pursued his claims by way of judicial review rather than by way of wrongful dismissal by ordinary action.

2. Whether s.28 of the Employment Act cap. 92 applied in the instant action.

By a decision delivered on 12 September 1997 Pathik J. decided, in answer to the first question, that the appellant should have proceeded by way of judicial review and not by writ of summons, and in answer to the second question, that s.28 of the Employment Act does not apply to the appellant.

Having decided those issues, he declared that the appellant was not entitled to continue the proceedings or to seek the relief claimed otherwise than by an application for judicial review, if he is still able to do so under O.53 of the High Court Rules. As a consequence the writ of summons was dismissed as an abuse of the process of the court. From that decision the appellant has appealed.

At the hearing of the appeal, Mr Seru, who has at all stages acted as counsel and solicitor for the appellant, was unable to appear. He advised the court that the appeal could be dealt with on the written submissions. This was unfortunate, as there were matters we wished to explore with counsel that were not dealt with in the written submissions. Mr Bukarao did not have adequate instructions to enable him to assist.

In his written submissions, Mr Seru accepted that the Judge's conclusion on the second question was correct. The appeal was directed only to his conclusion on the first.

The pleadings

The facts relied on by the appellant in support of his claim are set out in an

amended statement of claim. The questions were to be decided on the assumption that these facts would be established.

The appellant was employed by the Government of Fiji as Assistant Accounts Officer of the Ministry of Primary Industries. On 17 December 1985 he was charged with conspiracy to defraud and was subsequently interdicted on 18 December 1985. Following various appearances in the Magistrates' Court at Suva between April 1986 and April 1989, on 11 February 1991 the prosecution was discontinued on a *nolle prosequi* issued by the Director of Public Prosecutions.

Subsequent to the entry of the *nolle prosequi,* 26 disciplinary charges were laid against the appellant, all of which he denied by letter dated 14 August 1991. Those charges have never been heard. By letter dated 15 January 1992 the plaintiff was dismissed from his employment by the Government of Fiji. That dismissal was said to have been effective as from 17 December 1985.

The amended statement of claim goes on to plead:

> *"7. THAT the Plaintiff further claims that the Defendant its agents and/or servants had failed jointly or severally to comply with the provisions of the Public Service Commission (Constitution) Regulations at the material times in force prior to effecting the Plaintiff's interdiction and/or dismissal.*
>
> *8. THAT due to the non-compliance of the Defendants its agents and/or servants with the said Regulations the Plaintiff had been wrongly dismissed from the Public Service.*
>
> *9. WHEREFORE the Plaintiff seeks a Declaration from this Honourable Court that the Plaintiff was wrongfully dismissed from the Public Service on the 17th day of December, 1985."*

346

The amended statement of claim claims $36,636, being the appellant's salary to 7 August 1992, Fiji National Provident Fund contribution of $5,129, plus the additional contributions that would have been payable by reason of the lifting of the wage freeze, general damages and interest.

The decision

The Judge, after setting out the factual background, considered the legal issues. He found that there was a public duty imposed on the respondent as a result of which the appellant had to show a "sufficient interest" to have standing to enforce this public duty by way of judicial review. The Judge considered that the action by the respondent was taken against the appellant in accordance with the procedures laid down in the Public Service (Constitution) Regulations 1990. The appellant admitted that this was so. The Judge did not understand why the appellant had not applied for a judicial review of the respondent's decision. The appellant was, in his view, seeking to enforce a public right for the performance or proper performance by the respondent of a public duty. There was no contract between the appellant and the respondent, so that no question of private law arose. He referred to *O'Reilly and ors v Mackman and ors* [1983] 2 AC 237 where Lord Diplock said at 285:

> ***"Now that... all remedies for infringement of rights protected by public law can be obtained upon an application for judicial review,...it would in my view as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of Order 53 for the protection of such authorities."***

347

The Judge referred to the observation of Henry J. in *Doyle & Others v Northumbria Probation Committee* [1991] 1 WLR 1340, 1344:

> ***"Under Order 53, where the plaintiff wrongly brings his claim in the form of an application for judicial review, the court has power to order that claim to be continued as though it had been commenced by writ. But where a claim is wrongly commenced by writ, the court has no power to convert it into a claim for judicial review."***

The Judge pointed out that the appellant had not pleaded breach of contract, but rather an alleged wrongful interdiction under the Public Service (Constitution) Regulations 1990. He said that, since the issue was essentially of a public law nature, the appellant should have proceeded by way of judicial review. In his view, the appellant's action was a public law challenge disguised as a private law action.

After a review of further authorities, he expressed his conclusion that, in the light of those authorities and the decisions reached by the courts as to the form proceedings should take, the procedural objection raised by the respondent should be allowed. Accordingly the writ of summons was dismissed as an abuse of the process of the court.

<u>The appellant's submissions</u>

Mr. Seru first submitted that the Judge erred when he said in his decision concerning the relief the appellant was seeking that "he asks to be reinstated to the post he held." Such relief was sought in the statement of claim. But in the amended statement of claim filed on 12 August 1993 no such relief was sought. However, we are satisfied that this

error on the part of the Judge has no relevance to the conclusion that he reached on the first question.

Mr. Seru's next submission was that the Judge erred in failing to conclude that wrongful or unlawful dismissal is a cause of action which can be brought by a writ of summons. An employee who has been wrongfully dismissed may treat the contract as repudiated by the employer and sue for damages for its breach, or he may acquiesce in the employer's wrongful act and treat the contract as rescinded: 16 *Halsbury's Laws of England* para 650. However he can do so only if he is employed under a contract of service. The cause of action is breach of contract. Wrongful dismissal is not a cause of action in itself. Where an employee claims that he has been dismissed in a manner that breaches an express or implied term of his contract of service, he can sue for damages for wrongful dismissal by a writ of summons, founded on the cause of action of breach of contract.

The appellant does not allege that a contract of service existed between him and the Government. We do not consider he would be able to do so. The common law rule is that a person employed as a public officer by the Government is not employed under a contract of service. Thus in *Inland Revenue Commissioner v Hambrook* [1956] 2 QB 641, 654 Lord Goddard CJ said:

> ***"...an established civil servant is appointed to an office and is a public officer, remunerated by monies provided by Parliament, so that his employment depends not on a contract with the Crown but on appointment by the Crown, though there may be...exceptional cases as, for instance, an engagement for a definite period, where there is a contractual element in or collateral to his employment."***

The distinction referred to by Lord Goddard concerning engagements for a definite period applies in Fiji. On 17 December 1985, the date to which the dismissal was backdated, the terms of the appellant's appointment were governed by the Public Service Commission (Constitution) Regulations. These Regulations were repealed by the Public Service Commission Regulations 1987, which were in turn replaced by the Public Service Commission (Constitution) Regulations 1990, the Regulations in force at the time of the appellant's dismissal on 15 January 1992. These Regulations were enacted pursuant to s 157 of the Constitution then in force. "Officer" is defined as meaning a person employed in the public service who is subject to the jurisdiction of the Public Service Commission but does not include a wage earner. The appellant was an officer within that definition. Regulation 4 provides that the Regulations shall apply to all officers. Regulation 17 provides that the Commission may offer an appointment on contract for a fixed period to any person. That regulation does not apply in the present case. The Regulations set out in Part III detailed provision relating to the termination of appointments. It is these provisions that govern the grounds on which the appellant's employment could have been terminated.

It is clear that the terms of the appellant's employment by the Government were governed initially by the Public Service Commission (Constitution) Regulations and, by the time of his dismissal, by the 1990 Regulations. As he was not engaged on contract pursuant to R 17 or its predecessors, there was not a contract of service between the appellant and the Government. Rather, his employment depended on an appointment by the Government, in accordance with the Regulations in force at the time of his appointment. Those Regulations, and those that succeeded it, governed the terms of that appointment, including the grounds on

which he could be dismissed. We do not accept Mr. Seru's submission that the Judge ought to have found wrongful dismissal to be a cause of action in respect of which the appellant could bring an ordinary action based on a breach of a contract of service.

The position of the appellant is to be contrasted with the situation that came before this court in *Palani & Another v Fiji Electricity Authority,* CA ABU0028 of 1996, judgment 18 July 1997. The appellant Palani applied for judicial review following his suspension and subsequent dismissal by the respondent. Lyons J. held that he could not proceed by judicial review, a decision that was upheld by this court. This was because there was in that case a strict master and servant relationship between the appellant and the respondent sufficient to give rise to a private law obligation. The court adopted the approach of Sir John Donaldson MR in *R v East Berkshire Health Authority, ex parte Walsh* [1984] 3 All ER 425. The Master of the Rolls, after referring to three of the most well known cases in this area, *Vine v National Dock Labour Board* [1956] 3 All ER 939, *Ridge v Baldwin* [1963] 2 All ER 66 and *Malloch v Aberdeen Corp* [1971] 2 All ER 1278, 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 dismiss given by that scheme. In Ridge v Baldwin the power of 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*

of his employment... It will be this underpinning and not the seniority which injects the element of public law."

In the present case the terms of the appellant's employment, including the power of dismissal, were governed by the Regulations to which we have referred. It was the existence of those regulatory provisions which injected the element of public law that attracted the remedies of administrative law. Once that conclusion is reached, it follows that any remedy requires consideration of the exercise of what are in effect statutory powers, not the terms of a private contract. This distinction was emphasised by Purchas L J. in *ex parte Walsh* [1984] 3 All ER 425 when he said at 439:

"There is a danger of confusing the rights with their appropriate remedies enjoyed by an employee arising out of a private contract of employment with the performance by a public body of the duties imposed on it as part of the statutory terms under which it exercises its powers. The former are appropriate for private remedies inter partes whether by action in the High Court or in the appropriate statutory tribunal, while the latter are subject to the supervisory powers of the court under Ord 53."

The paragraphs in the amended statement of claim which we have set out earlier make it perfectly plain that the appellant was relying on what he claimed to have been a failure by the respondent to comply with the provisions of the Regulations, not a breach of any term expressed or implied in any contract of service claimed to have existed. For these reasons we consider the Judge was correct to conclude that, as the appellant had been appointed under a statutory provision, public law applied to his appointment, and any claim resulting from his dismissal can only be brought by an application for judicial review.

352

We have considered the additional grounds submitted in Mr. Seru's written submissions. We do not find in them any basis upon which we could find that the Judge's conclusion was erroneous.

The appellant's position

On the facts set out in the amended statement of claim we have some concern that the appellant may have suffered an injustice. The elements of the offence of conspiracy to defraud were never proved. Similarly, the facts that may have supported the 26 disciplinary charges against the appellant were also never proved. Yet without any of these charges having been established, the respondent, according to the pleading, dismissed the appellant from his employment by letter dated 15 January 1992. On these facts, if they can be established, the appellant may well have been able to contend that his employment had been terminated otherwise then in accordance with the procedures laid down in part III of the Regulations. But we emphasise that these observations are based solely on the facts pleaded in the amended statement of claim. The respondent's version of what occurred may result in an entirely different picture emerging.

These proceedings have had an unfortunate history. They were commenced reasonably promptly on 9 July 1992, some six months after the letter of 15 January 1992 terminating the employment. Almost three years later, on 22 March 1995 the Deputy Registrar made orders on a summons for directions, including that the action be tried before a Judge alone at Suva and be set down for hearing within 30 days.

It was not so set down. Almost two years later, on 3 March 1997 there was held a pre-trial conference that outlined the issues in dispute. It was those issues that came before Pathik J. and resulted in his decision delivered on 12 September 1997. Thus a period of over 5 years had gone by since the proceedings were commenced.

353

As the Judge pointed out, the appellant can apply under Order 53 of the High Court Rules for leave to bring an application for judicial review. In the normal course, such a long delay from 15 January 1992, when the appellant was dismissed, would be fatal to any application for leave. However, in the end the dominating consideration would be the interests of justice. Provided that it can be established that this delay was not due to the appellant personally, it may well be that in these somewhat exceptional circumstances the granting of leave may be appropriate. But we emphasise that on that issue we are expressing no concluded view. If an application for leave is brought, it will be for the Judge before whom it comes to decide whether the appellant should be allowed to proceed at this very late stage.

The Result

The appeal is dismissed. The respondent is entitled to costs which we fix at $750.00.

.....
Sir Moti Tikaram
President

.....
Justice I. R. Thompson
Justice of Appeal

.....
Sir David Tompkins
Justice of Appeal

Solicitors:

Messrs. Q.B. Bale and Associates, Suva for the Appellant
Office of the Attorney-General Chambers, Suva for the Respondent

C:\OFFICE\WPWIN\WPDOCS\USHA\ABU0058U.97S