IN THE FIJI COURT OF APPEAL
CIVIL JURISDICTION

CIVIL APPEAL NO.ABU0013 OF 1999S
(On appeal from the High Court of Fiji at Suva
in Judicial Review No.GHBJ 22 of 1997S)

BETWEEN:

FIJI PUBLIC SERVICE ASSOCIATION AND
SATISH KUMAR (father's name Sukh Ram)

Appellants

AND:

THE ARBITRATION TRIBUNAL

First Respondent

AND:

FIJI ISLANDS TRADE AND INVESTMENT BOARD

Second Respondent

Coram: Eichelbaum JA (Presiding Judge)
Sheppard JA
Smellie JA

Hearing: 21 November 2001

Counsel: Mr H. Nagin for the Appellants
Ms N. Basawaiya for the First Respondent
Mr. J. Apted for the Second Respondent

Date of Judgment: 19 February 2002

JUDGMENT OF THE COURT

The appeal which is brought by the appellants is from part of the order of the High Court of Fiji (Scott J.) made on 18 February 1999. By the order his Lordship declared that the Arbitration Tribunal (the first respondent) erred in holding that an industrial agreement described as "the Collective Agreement", insofar as it restricted an employer's right summarily to dismiss an employee, was *ultra vires* the Employment Act (Cap.92). The only other order made by the Court was an order that all other prayers for relief by the applicants (the appellants before us) be dismissed.

The appellants do not appeal from the declaration made by Scott J.. Their complaint is that instead of dismissing all other prayers for relief, his Lordship should have given consequential relief in the form of an order setting aside the decision of the Board to terminate the employment of Mr. Kumar and providing that the matter be sent back to the Arbitration Tribunal to be heard and determined according to law.

At the material time the appellant, Mr Kumar, was an employee of the second respondent, the Fiji Islands Trade and Investment Board.

The relevant provisions of the industrial agreement are contained in Article 34. Article 34 deals with disciplinary offences a number of which are specified in Article 34.1. Article 34.2 provides that an employee who commits any offence specified in Article 34 may be disciplined by warnings, in some cases verbal, and in other cases in writing. No other form of discipline appears to be provided for. Article 34.3 is as follows:-

> "Notwithstanding the fact that the employer has certain rights under Section 28 of the employment ordinance to summarily dismiss an employee, it is agreed that the maximum penalty for any misconduct or offence shall be suspension from duty on full pay with due notice being given to the Association within 24 hours. The provision of Grievance Procedure as detailed in article 36 herein shall then be brought in use thereafter."

With Article 34 needs to be read Article 36 referred to in Article 34.3. In relation to it, it is enough to say that Article 36.5 provides that, if attempts at conciliation prove abortive, the dispute shall be resolved by the use of procedures under the Trade Disputes Act (Cap.97) or any other machinery for the settlement of disputes. Article 36.6 provides:

> "It is further agreed that no strike or action by the employer to create a lockout shall be taken until all the steps as outlined in the above procedure shall have been fully exhausted."

Section 28 of the Employment Act provides that an employer shall not dismiss an employee summarily except in the circumstances specified in the section. These are:-

> "(a) where an employee is guilty of misconduct inconsistent with the fulfilment of the express or implied conditions of his Contract of Service;
> (b) for wilful disobedience to lawful orders given by the employer;
> (c) for lack of the skill which the employee expressly or by implication warranted himself to possess;
> (d) for habitual or substantial neglect of his duties;
> (e) for continual absence from work without the permission of the employer and without other reasonable excuse".

It is to be observed that s.28 of the Employment Act is not intended to apply except in cases of summary dismissal. Scott J. said that the Tribunal had found that article 34 (3) was null and void to the extent that it purported to deprive the Board of powers of summary dismissal conferred upon it by s.28 of the Employment Act. The Tribunal said that, in legal terms, it was *ultra vires* the relevant provisions of the Employment Act to that degree. The Tribunal said that no contractual agreement could fetter the operation of a law so that article 34.3 must be read down and its opening words deleted. Scott J. also said that the Tribunal had found that the Board was not obliged to follow the grievance procedure provided for in Article 36 in cases of summary dismissal. All that was required was that the Board have in place procedures that allowed an employee to be able to put his or her case before the decision to dismiss was taken. The Tribunal said that it was satisfied that those procedures were followed by the Chief Executive of the Board in the instant case. It was against that award or decision that the appellants, initiated proceedings for judicial review.

Scott J. said that when the matter came on for hearing on 10 February 1999 both counsel accepted that the Arbitration Tribunal had erred in law when it ruled that the Collective Agreement was *ultra vires* the Employment Act. Scott J. said he agreed with this conclusion. His Lordship referred to s.13 of the Employment Act which provides that no person shall

employ any employee and no employee shall be employed under any contract of service except in accordance with the provisions of the Act. Section 15 provides that contracts of service may be oral or written. Part V of the Act applies to oral contracts. Part VI applies to written contracts. His Lordship thought that, in view of a letter dated 24 January 1992 written by the Board to Mr Kumar, the contract was clearly a written contract so that Section s.28 which deals with summary dismissal in the case of oral contracts had no application. But he also said that, even if s.28 had applied, it was, in his opinion, misconstrued by the Tribunal

The letter of 24 January 1992, was headed, "Offer of Appointment". It was in the following terms:

> "With reference to your application dated 15 September 1991, I am happy to offer you appointment as a Trade Officer with effect from 3 February 1992.
>
> You will receive salary as from that date at the rate of $11,685 in the salary scale of FTIB 5 (08) and will be required to contribute to the Fiji National Provident Fund in accordance with the FNPF Ordinance Cap 191, and also Basic Tax and PAYE on your remuneration.
>
> Your appointment may be terminated by giving one months' notice or by payment of one months' salary in lieu of notice.
>
> You will throughout such employment be required to comply with the rules and regulations of the Board in force from time to time and the Collective Agreement signed between FTIB and the Fiji Public Service Association regarding the terms and conditions of employment of salaried staff and the FTIB financial regulations which will be made available to you when you join the Board.
>
> You will initially be required to serve a period of six months on probation from the date of your appointment."

It is to be noted that Mr. Kumar's appointment might be terminated on one month's notice or by the payment of one month's salary in lieu of notice. At the end of the letter was a

provision whereby Mr Kumar could accept the offer by signing that part of the letter. This he did on 27 January 1992.

Section 2 of the Act defines the term oral contract to mean a contract of service which, under the provisions of Part V of the Act, is not required to be made in writing but which may nevertheless be subsequently evidenced in writing. Section 2 defines "written contract" to mean a contract of service which under the provisions of Part VI is required to be in writing. Section 21 provides that all contracts of service, other than contracts which are required by the Act or any other law to be made in writing may be made orally. The only contracts which are required by the Act to be made in writing are those described in s.32. The contract here is not of a kind provided for in that section.

The distinction which the legislature intended to draw is apparent enough but some of the language which is used in these various provisions tends to be confusing. For instance the definition of oral contract refers to a contract of service which is not required to be made in writing but which may nevertheless be subsequently evidenced in writing. For the purposes of the common law a contract may be either oral or written. In the case of written contracts a difficulty sometimes arises as to whether a document which appears to contain the terms of the contract was intended by the parties to include the whole of the terms of the contract or whether it was intended that the prior discussions of the parties, insofar as they were contractual in nature, were intended to remain binding. In such cases the contract is said to be partly oral and partly in writing. The expression "evidenced in writing" refers at common law to a contract which has been made orally and which takes effect when so made but which is subsequently recorded in writing. Thus the Act does not appear to distinguish clearly between oral and written contracts in the sense of plainly excluding all contracts which it

intends not to be treated as written contracts from those which the common law would regard as falling into that category. But the position is clarified by s.32 of the Act which specifies the contracts which must be made in writing. The only class of contracts which could have relevance here is that provided for in subsec (1) (a), namely a contract of service made for a period of or exceeding six months. This is not such a contract because it could be determined on one month's notice. For the purposes of the Act, therefore, it is an oral contract. In the result nothing in our opinion turns on the fact that Scott J. thought that the contract was written rather than oral.

Another matter to be put out of the way is a submission made by counsel for the Appellants that the paragraph in the letter of 24 January 1992 providing for termination on one month's notice applied only to the probationary period provided for in the last paragraph of the letter. There was no development of the argument in relation to this matter. In our opinion the argument could not succeed. The provision about termination plainly applied throughout the life of the contract.

It is next necessary to refer to the facts of the matter. These we have taken from his Lordship's judgment which gives a sufficient account of them. Mr Kumar's employment began in January 1992. By October 1996 Mr Kumar had reached the rank of Senior Assistant Officer in the Board's Projects Division. His Lordship said that, unfortunately, his progress up the organisation was then bought to a halt by the consequences of a romantic liaison which he formed with a fellow employee, Ms Shanaaz Nisha. On 10 October 1996 Ms Nisha wrote to the Board's Chief Executive complaining that she had some time previously noted some white dust on her desk and printer. It appeared that a ceiling panel just above her telephone had been removed and not properly replaced. She also noticed that her telephone had been

rewired. For the next three or four weeks she experienced unusual noises on her telephone whenever she used it.

Ms Nisha told the Chief Executive that she had taken a day's leave on 3 October 1996. She planned to meet a Mr. Shameem at the Berjaya Hotel but was very surprised when she arrived there to find not Mr. Shameem but Mr. Kumar who was disguised in a cap and dark glasses. When she asked Mr. Kumar how he had known that she was going to be at the Berjaya Hotel he told her that he was "smart enough to tap my phone conversations". He told her that he had tapped her telephone because he wanted to know to whom she was talking and where she was going. It appeared, so his Lordship said, that Mr. Kumar also told Ms. Nisha that he had recorded her telephone conversation on tape. Ms Nisha concluded her letter of complaint by asking the Chief Executive Officer to enquire into the matter and to take "very very serious disciplinary action" against Mr. Kumar.

On 10 October 1996 the Chief Executive wrote to Mr. Kumar telling him of the substance of the complaint that had been made.

Mr Kumar was informed that an inquiry was to be held on 16 October to determine the truth of the allegations made against him. At the inquiry Mr Kumar denied that he had tapped Ms Nisha's telephone. He conceded that he had been having " a romantic liaison " with Ms Nisha and that he had established that she was regularly telephoning Mr Shameem in Lautoka. He had also discovered that Mr Shameem planned to visit Suva on 7 October, had telephoned the Department of Transport on a false pretext to find out Mr Shameem's car registration number, had kept observation on Mr. Shameem's car dressed in a cap and dark glasses, was equipped with a camera and dictaphone, and had established, upon making

enquiries at the reception desk, that Mr Shameem had registered into the hotel under a false name.

The Chief Executive reached the conclusion that Mr. Kumar had harassed Ms Nisha and had also tapped her telephone. He described the circumstances as "the stuff of spy novels". He found him guilty of serious misconduct.

On 24 October the Chief Executive wrote to Mr Kumar. He explained he had found him guilty of "serious improper conduct" in his official capacity. He went on to say that since telephone tapping was illegal as well as undesirable, what had occurred amounted to sexual harassment, that Mr. Kumar had reported sick when he was not in fact sick and that there already was a warning letter on his file he had decided as follows:

> "I do not consider the maximum penalties stipulated in the Collective Agreement i.e. suspension from duty on full pay as commensurable with the offence. A harsher disciplinary action is called for. Because the Collective Agreement does not offer me a disciplinary action option that befits the offence I have decided to invoke Section 28 of the Employment Act and terminate your services with immediate effect. Needless to say if you feel aggrieved by my decision you have recourse under the Collective Agreement to pursue your grievance".

In March 1997 a trade dispute within the meaning of the Trade Disputes Act (Cap 97) was referred to the Arbitration Tribunal for settlement. The two matter referred were:

> "1. Failure/Delay to reintstate Mr. Satish Kumar a Senior Assistant Officer Projects Division; and
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> 2. Breach by the Chief Executive of the Fiji Trade and Investment Board of Article 34 of the Collective Agreement existing between the Fiji Public Service Association and the Fiji Trade and Investment Board as regards Mr. Satish Kumar's dismissal".

On 5 May 1997 the hearing took place before the Tribunal. It had evidence on oath from Ms Nisha who, to use his expression, "stood by her story". On the facts, the Tribunal was satisfied that the evidence had sufficiently established Mr. Kumar's misconduct. The Tribunal described the misconduct as a serious invasion of privacy. It said that in some circumstances it might also be termed sexual harassment given the parties "erstwhile relationship". He said that it was conduct deserving of summary dismissal and expressed the opinion that Mr Kumar's hitherto unblemished record was insufficient to save his career given the gravity of the offence.

The Tribunal went on to hold that article 34 (3) of the Collective Agreement was null and void to the extent that it purported to deprive the Board of the powers of summary dismissal conferred upon it by s.28 of the Employment Act (Cap 92). As earlier mentioned, the Tribunal held that the Article was *ultra vires* the relevant provisions of the Employment Act to that extent. It followed, so the Tribunal found that the Board was not obliged to follow the grievance procedure provided for in Article 36 in cases of summary dismissal. All that was required was that the Board have in place procedures that allowed an employee to be able to put his or her case before the decision to dismiss was taken. The Tribunal was satisfied that those procedures had been followed by the Chief Executive in the present case.

The matter came to the Court by way of an application for a writ of *certiorari*. The hearing took place on 10 February 1999. Scott J. said that both counsel accepted that the Tribunal had erred in law when it ruled that the Collective Agreement was *ultra vires* the Employment Act. His Lordship said that he agreed with this conclusion. He referred to s.13 of the Employment Act which provides that no person shall employ any employee and no employee shall be employed under any contract of service except in accordance with the provisions of

the Act. He went on to deal with the question whether or not the contract was, for the purposes of the Act, a written contract or an oral contract. We have already discussed that matter. It will be recalled that his Lordship thought that the contract was written, but in terms of the legislation, it was, notwithstanding the letter of 24 January 1992, an oral contract.

His Lordship said that, even if s.28 had applied it was, in his opinion, misconstrued by the Arbitration Tribunal. Section 28 provided that an employer should not dismiss an employee summarily except in the circumstances specified therein. These have been earlier set out. His Lordship said that the section did not confer an unfettered right to dismiss an employee where any of the matters specified in s.28 was found to exist; rather it removed the common law right to dismiss except where paragraphs (a) to (e) applied. He added that if any of the paragraphs applied, the common law right continued and there was no statutory or other objection to that right being fettered by an agreement between the employer and its employees.

His Lordship then came to the question of discretion. *Certiorari* is, of course, a discretionary remedy. He said that, having reached the conclusion that the Arbitration Tribunal had erred in law, the next question which called for an answer was what the proper consequences of the error should be. Counsel for Mr. Kumar argued that, since the Tribunal had erred in law, the award should be set aside and the dispute re-heard. Scott J. said that, although the association would be well content with having succeeded in its submission on the legal status of the Collective Agreement, this outcome would be of little satisfaction to Mr Kumar who had lost his job in October 1996 and who had then married Ms Nisha in November 1997. Counsel for the Board pointed to the provision in the letter of 24 January 1992 providing for the termination of the contract on one month's notice. Counsel for the Board submitted to his

Lordship that he should exercise his discretion against ordering *certiorari* and instead award Mr Kumar his one month's wages. Counsel for the Board urged his Lordship not to order *certiorari*. He said that the Tribunal's error of law was quite independent of its findings on the evidence. His Lordship said that Counsel for Mr. Kumar was not able to tell him whether Mr. Kumar had remained out of work after leaving the Board and if so, for how long. We were informed at the hearing before us that he had had employment with another undertaking but still wanted the matter sent back to the Tribunal so that it could make the orders that it should have made at the original hearing.

His Lordship said that it was, at the time he was dealing with the matter (18 February 1999), just under 2 ½ years since Mr. Kumar had been dismissed. His Lordship said that, although it was accepted that the procedure by which Mr. Kumar was dismissed, "violated" the collective Agreement, it was never suggested that the Board could not perfectly properly have terminated Mr. Kumar's contract either by giving him one month's notice or by paying him one month's salary in lieu thereof. His Lordship added that it had to be remembered that the effect of the two modes of terminating the employment were not the same. While both resulted in the termination of the employment, dismissal "permanently" endorses the employee's record of employment while simple termination of a contract did not. It was for this reason, so his Lordship said, that dismissal for alleged misconduct required the observance of special procedures such as were contained in the Collective Agreement.

His Lordship said that he accepted the submissions of counsel for the Board that the admitted error of law by the Tribunal was distinct from its findings on the facts and its assessment of their gravity. In that connection it may be said that the only point of contest between the parties at the hearing before the Arbitration Tribunal was the question whether Mr. Kumar

had tapped Ms Nisha's telephone. Of course, all this in a sense is water under the bridge, Mr. Kumar and Ms Nisha having been married since 1997.

His Lordship emphasised that the proceeding before him was not an appeal; it was an application for judicial review. But he also said that in his view, the error of law which had been committed by the Tribunal had no effect on the procedure by which the Tribunal reached its factual conclusions so that there was no basis for them to be disturbed. By bringing the proceedings the the Public Service Association had established a point of law which was obviously of importance to it. Mr. Kumar, on the other hand had not, in his Lordship's view, shown that the termination of his employment was unjustifiable. His Lordship said that in all the circumstances he declined to order *certiorari* to issue. He made the declaration to which reference has been made. He said that he could find no justification for awarding damages against the Tribunal and said that in any event he considered that he had no jurisdiction in proceedings for judicial review to award damages. That view of the law seems to us to be correct. His Lordship said that, in order to avoid the possibility of further litigation, the Board would, he was confident, be only too willing to issue a suitable letter of termination of contract to Mr. Kumar and one month's salary in lieu of notice.

We have not been informed whether the salary has been paid, but there remains, of course, the complaint made by counsel for Mr. Kumar that the fact that Mr. Kumar was dismissed for misconduct remains a blot on his record. On the other hand, in the light of the way the facts came out before the Tribunal and not overlooking the issue which there was in relation to the tapping of the telephone, it is clear that the findings of misconduct were justified.

In his submissions to us, counsel for Mr. Kumar said that the Board had decided summarily to dismiss Mr. Kumar. Counsel said that the power was not there. The issue was referred to arbitration and the Tribunal, if it found that the summary dismissal power was not available, should have held that the dismissal was unlawful. Counsel submitted that the Tribunal would most probably have then re-instated Mr. Kumar.

Undoubtedly the hearing before the Arbitration Tribunal miscarried because of the Tribunal's misunderstanding of the effect of s.28 of the Employment Act on Clause 34 of the Collective Agreement. One of the things that is perhaps puzzling about the orders made by his Lordship is that there is no declaration that the purported dismissal of Mr. Kumar was unlawful. That is the declaration that one would have expected to have been made.

In the circumstances it may seem somewhat hard on Mr. Kumar now to say that he should be refused the relief he really wants because of the long lapse of time and supervening events, particularly his marriage to Ms Nisha and the fact that he has other employment. But it has to be remembered, as his Lordship pointed out, that he could have been dismissed by the giving of one month's notice pursuant to the provisions of the letter of 24 January 1992. Making the declaration mentioned earlier would have enabled Mr Kumar to sue in the courts for damages equivalent to a month's wages representing the notice he ought to have received.

We confess that we have not found this an easy matter to decide. Considerations of practicality and the futility of now making the order which Mr. Kumar requires weigh against the making of the ordinary order which would likely be made in a case such as this, namely an order remitting the matter to the Tribunal to be heard and determined according to law.

We are empowered by Rule 22 (3) of the Court of Appeal Rules to draw inferences of fact and to give any judgment or make any order which ought to have been given or made, and to make such further or other order as the case may require. We think that justice will best be served by dismissing this appeal and leaving the orders made by Scott J. as they are provided that a declaration such as we have foreshadowed is made. We confess that we have been moved to take this course by practical considerations particularly the seeming futility of now reawakening the whole issue. We acknowledge that Mr. Kumar may feel injured by this, but, as his Lordship said, the facts are clear and not really in contention. Obviously Mr. Kumar was jealous of any other suitors for Ms Nisha's hand. He acted unwisely and foolishly. But all that is over especially in the light of his marriage to Ms Nisha. Having taken these various considerations into account, we have reached the conclusion that, except to make the declaration that the High Court ought to have made, we should dismiss the appeal. In all the circumstances we do not propose to make any order for costs.

Before we conclude we should deal briefly with a further submission made on behalf of the Board. It is based upon s.117 (1) of the 1997 Constitution which provides that the judicial power of the State vests in the High Court, the Court of Appeal and the Supreme Court and in such other Courts as are created by law. Upon the basis of this provision it was submitted that it would now be constitutionally impossible for the Tribunal to reconsider the matter. The proposition which was put to us was that the Tribunal in ordering the reinstatement of an employee would be exercising the judicial power of Fiji and was not constitutionally authorised to do so because it was not constituted as a Court.

As counsel said, the provision was probably based upon the provisions of s.71 of the Australian Constitution which provides that the judicial power of the Commonwealth of

Australia is to be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other Federal Courts as the Parliament creates, and in such other Courts that it invests with Federal jurisdiction. In the view that we take of this matter it is unnecessary for us to deal with that submission and we do not. But we make the following comments.

Section 71 was an original section in the Australian Constitution. It is to be found in Chapter III of the Constitution which provides for the Judicature. In relation to tribunals, such as administrative tribunals and industrial tribunals, it would be right to say that s.71 has had a long and complicated history. A number of the Australian cases are cited in the parties' submissions. We do not intend to embark upon a discussion of these authorities but the most relevant of them is Re Ranger Uranimum Mines; ex parte Federation of Miscellaneous Workers Union of Australia (1987) 163 CLR 656 cited in the parties' submissions. To this we would add a reference to Re Dingjam; ex parte Wagner (1995) 183 CLR 323.

Unlike the comparable provision in Australia, s.117 of the Fiji Constitution came into force at a time when Fiji had a settled system of courts and tribunals each of which had well recognised jurisdiction and powers. Eventually this matter will have to be considered in an appropriate case. When it is, those who present the argument should bear in mind that, although s.117 of the Fiji Constitution is in terms very similar to s.71 of the Australian Constitution, it does not necessarily follow that it was intended that Fiji should pick up the law in relation to this matter as it has been developed in Australia under a Federal Constitution. The matter needs to be looked at from Fiji's point of view. No doubt the Australian cases will be found helpful but it would nevertheless seem desirable to endeavour to approach the matter as a problem which confronts Fiji and not simply resort to the

labyrinth of judicial pronouncements which have been made during the last 100 years in relation to the Constitution of Australia and the conditions which apply in that country.

In summary then the orders we make are as follows:

1. The orders made by Scott J. be varied by adding thereto a declaration in the following terms:

   It is declared that the Fiji Islands Trades and Investment Board's purported dismissal of Mr Kumar by its letter dated 24 October 1996 was unlawful.

2. The appeal be otherwise dismissed.

3. There be no order as to costs.

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Eichelbaum J A

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Sheppard J A

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Smellie J A

FIJI COURT OF APPEAL