IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CIVIL APPEAL NO. ABU 095 of 2023
[In the High Court at Lautoka Case No. HBC 011 of 2020]

BETWEEN	**:**	**THE LABOUR OFFICE FOR AND ON BEHALF OF ANDREW REDFERN**
		Appellant
AND	**:**	**WYNDHAM VACATION RESORTS (FIJI) PTE LIMITED**
		Respondent
Coram	**:**	**Prematilaka, RJA** **Qetaki, RJA** **Andrée Wiltens, JA**
Counsel	**:**	**Mr. S. Kant for the Appellant** **Mr. J. Apted for the Respondent**
Date of Hearing	**:**	**08 May 2025**
Date of Judgment	**:**	**29 May 2025**

JUDGMENT

Prematilaka, RJA

[1] I agree with reasons given and orders made by Andrée Wiltens, JA.

Qetaki, RJA

[2] I have read and considered the judgment in draft and I agree with it, the reasoning and orders.

Andrée Wiltens, JA

A. Introduction

[3] Andrew Redfern was employed by Wyndham Vacation Resorts (Fiji) PTE Limited ("Wyndham") as a Sales Consultant from 8 February 2016. His employment was terminated on 19 September 2019 following an internal investigation which concluded that he had defecated on the floor of male toilet within his place of employment.

[4] He referred his case to Mediation Services on or about 19 September 2019, but mediation was unsuccessful. On 30 January 2020, the mediator referred the case to the Employment Relations Tribunal ("Tribunal"), pursuant to s. 194(4) of the Employment Relations Act 2007 ("ERA"). However, Mr Redfern subsequently withdrew his case as he did not wish to be limited to the $40,000 jurisdictional cap of the Tribunal.

[5] Instead, Mr Redfern filed a Writ of Summons and Statement of Claim dated 10 September 2020 in the Employment Relations Court ("ERC"), seeking both special and general damages.

[6] On 7 October 2020, Wyndham filed a Summons to Strike Out the Claim on various grounds, including that no reasonable cause of action was disclosed and importantly that the ERC lacked jurisdiction to hear the matter.

[7] By decision of 19 September 2023, the ERC struck out the Claim primarily on the basis of lack of jurisdiction. It is this decision that is the subject of this appeal.

[8] However, before the merits of the appeal could be considered a preliminary point of law was taken by Mr Apted, on behalf of Wyndham, which was the main subject of argument before this Court.

B. Preliminary Point

[9] Wyndham submitted that Mr Redfern had not obtained leave to appeal against an interlocutory order (the order to strike out the Claim), as required by section 12(2)(f) of the Court of Appeal Act 1949. As a result, Wyndham maintained the appeal should be dismissed as incompetent.

[10] This submission turns on the interpretation of the relevant subsection, in particular, as to the meaning of "interlocutory".

[11] Section 12(2)(f) reads:

> *"No appeal shall lie without the leave of the Judge or of the Court of Appeal from an interlocutory order or interlocutory judgment made or given by the Judge of the High Court…"*

[12] Numerous cases have looked to see whether in Fiji a strike out application/order is interlocutory or final, with somewhat inconsistent results. There are two schools of thought: the "order approach" and the "application approach".

[13] In *Suresh Charan v SM Shah & Others*[1] the difference between these approaches was explained as follows:

> *"The "order approach" required the classification of an order as interlocutory or final by reference to its effect. If it brought the proceedings to an end, it was a final order, if it did not, it was an interlocutory order. The "application approach" looked to the application rather than the order actually made as giving identity to the order. The order was treated as final only if the entire cause or matter be fully determined whichever way the Court decided the application."*

1 (1995) 41 FLR 65

[14] The Supreme Court of Fiji cited the above passage in *Jivaratnam v Prasad*[2] when considering the applicable approach to be applied in Fiji. The Supreme Court endorsed the "application approach", as had been adopted in *Goundar v Minister for Health*[3]. The Supreme Court concluded:

> *"In the absence of any statutory assistance to aid the courts in Fiji, this Court is of the view that the "application approach" should be adopted unless there are strong reasons in any particular case for not doing so. As a general guide and rule of thumb, when and where there is doubt if the Order is final or interlocutory, leave should be sought."*

[15] In a similar case to this appeal, namely *Cakaunitavuki v Colonial Fiji Life Limited*[4], a successful application to strike out was held to be an interlocutory order following the "application approach", with the result that the subsequent appeal was found to be incompetent for lack of leave. This followed the Court inviting the appellant to seek leave to appeal out of time, and providing the opportunity for the appellant to do so, in order that the substance of the appeal could be considered. However, the appellant chose not to do so and paid the price.

[16] That situation is similar to the present case. Mr Apted, counsel for Wyndham, very fairly put Mr Redfern on notice regarding the need for leave by his Respondent's Notice of 20 October 2023. The requirement for leave was raised again at mentions on 30 August 2024 (when Jitoko P. adjourned the matter with the notation: "*NB: To allow the Appellant to look at issues of leave and jurisdiction*"), and on 5 September 2024, when the Court was advised counsel was taking instructions regarding the matter.

[17] Despite this, Mr Redfern has not sought nor obtained leave.

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2 [2023] FJSC 11; CBV 0005.2020 (28 April 2023)
3 [2008] FJCA 40; ABU 0075.2006S (9 July 2008)
4 [2021] FJCA 21; ABU 012.2020 (7 January 2021)

[18] Mr Kant, counsel for Mr Refern, accepted the "application approach" applies, but nevertheless sought to be permitted to proceed with the appeal without leave. He maintained that in this case there are "strong reasons" for this Court to not follow the *ratio* in *Jivaratnam*. He provided two "strong reasons" in support of his position.

- Firstly, it was submitted that as the decision being appealed (the strike out order) effectively brought Mr Redfern's claim to an end, this Court should follow what he described as the "guiding decision" in *Abhinesh Singh and Another v Rajesh Singh and Others*[5]. There it was held that leave was not required when appealing a decision whereby the matter has come to an end.

  However, there were two counters to that submission by Mr Apted: (i) the Supreme Court decision in *Jivaratnam* is the "guiding decision" and is to be followed by this Court; and (ii), to pay heed to the submission would be to accept that the "order approach" is to be followed in Fiji, which would be inconsistent with the Supreme Court judgment.

- Secondly, Mr Kant relies on section 17 of the Court of Appeal Act 1949 which provides for this Court to entertain an appeal "…*on any terms which it thinks just*". In support of this argument, he cited *R.B. Patel Limited v J.P. Bajpai & Co. Ltd*[6] in which this Court stated:

  > *"It is clear that s.17 is paramount, and its purpose is to do justice, where strict compliance with the rules would deny it."*

[19] Mr Kant further cited in aid the case of *Attorney-General of Fiji and Another v Ram Kumari and Another*[7] which dealt with a similar situation to the present case in that there was an appeal against an interlocutory order where leave had not been sought or obtained. The Court nevertheless entertained the appeal "in the interests of justice" as it considered the

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5 [2023] FJCA 147; ABU 0089.2020 (28 July 2023)
6 [1987] 33 FLR 92
7 [2015] FJCA 139; ABU 065.2012 (2 October 2015)

point in contention was of public interest, citing the *Patel v Bajpai* decision (above) in support.

[20] Mr Kant submitted the present appeal similarly involves important questions of law and public interest, which he went on to discuss.

[21] At the heart of the appeal is the contention by Mr Kant that Mr Redfern's employment dispute should not be arbitrarily limited to only $40,000. It was due to that cap, that the claim was laid in the ERC where there is no such jurisdictional limit. Mr Kant also foresaw Mr Apted's submission and maintained that the claim was one based on Mr Redfern's contract of employment.

[22] However, the approach taken is hotly disputed by Mr Apted. He referred the Court to Mr Redfern's Claim, and pointed out that it is not based on the contract of employment entered into between Mr Redfern and Wyndham; and that the pleadings do not refer to any term of the contract or plead a breach of any term. Accordingly, he submitted that Mr Redfern's qualm with Wyndham was an "employment grievance" as that term is defined in s.4 of ERA:

> *"employment grievance" means a grievance that a worker may have against a worker's employer …because of the worker's claim that –*
>
> *(a) The worker has been dismissed;*
>
> *….."*

[23] Mr Apted next submitted that the ERA framework established for dealing with "employment grievances" mandates Mr Redfern's dispute to be first referred to Mediation Services, and if that fails to resolve the dispute, for the Mediator to refer the grievance to the Tribunal. The matter, he submitted, should follow that procedure and not be permitted to by-pass it.

[24] Mr Apted further submitted that the ERC does not have jurisdiction to hear "employment grievances", relying on the provisions set out as to ERC's jurisdiction in section 220 of

ERA, which does not include jurisdiction to hear "employment grievances". He accepted that the section provided for employment contractual disputes, but as related above, maintained Mr Redfern's Claim was not such.

C. Discussion

[25] Accordingly, the preliminary issue for this Court to determine is whether there is an important question of law and/or public interest such that leave to appeal can be dispensed with in the circumstances of this case? In other words, is the question of the appropriate jurisdiction for Mr Redfern's claim a sufficiently strong reason for the appeal to proceed without leave to appeal.

[26] The case of *ANZ v Ajendra Sharma*[8] assists. The case involved the dismissal of Mr Sharma after 10 years service for the ANZ. Mediation was engaged, but was unsuccessful and the matter was referred to the Tribunal. However, Mr Sharma then discontinued his grievance and filed a Claim in the ERC seeking damages and other relief. The same arguments as were rehearsed before this Court were then advanced, with the ANZ applying to strike out the case on the basis of lack of jurisdiction. The application was refused, and ANZ appealed, having first obtained leave. The appeal was allowed, and the claim struck out. The Court relevantly stated:

> *"The Employment Relations Court has no jurisdiction to hear and determine an employment grievance brought by a worker….Such a worker is bound to pursue their employment grievance first, by lodging it in accordance with s. 188(4) and secondly, in accordance with Part 13 pursuant to which the employment grievance will "first be referred for mediation services…""*
>
> *"The ERC has no jurisdiction to hear employment grievances but if a claim for unjustified or unfair dismissal is "founded on a contract of employment", and properly pleaded as such, the ERC has jurisdiction under s.220(1)(h) to hear and determine such a claim."*

8 [2024] FJCA 29; ABU 030.2022 (29 February 2024)

[27] The decision as to leave by a single judge in *Capital Insurance Limited v Vikash Deepak Kumar*[9] is also instructive. This involved an application for leave to appeal a consent order, on the basis that the orders made were outside the Court's jurisdiction. The Judge identified conflicting High Court authorities. Firstly, in *ANZ v Sharma*, where the Judge had decided that the ERT had jurisdiction in employment cases for sums up to $40,000, and for claims beyond that, considered the claims must be filed in the ERC, which had no such cap. Secondly, as per *Buksh v Bred Bank (Fiji) Ltd*[10], where the Judge decided employment grievances had to be first the subject of mediation, and could thereafter be referred to the Tribunal. He noted the Tribunal has the power to transfer the matter to the ERC in certain circumstances. However, it was held that "*…the monetary limitation placed on the Tribunal does not confer jurisdiction on the ERC to hear employment grievances*". The Judge further held that ERC's originating jurisdiction is restricted to the matters set out in s.220.

[28] The single Judge had the advantage of this Court's decision in *ANZ v Sharma*. He determined the legal position to be that:

> *"…if and when the action is founded and properly pleaded as unjustified dismissal leading to breach of contract of employment and pleaded as such, the ERC has jurisdiction under the ERA. If the action is based on an employment grievance and pleaded as such, the ERC has no jurisdiction. Therefore, the forum will be determined by the manner in which the action is couched including the remedies sought."*

D. Decision

[29] Mr Kant's is concerned that the limit set for employment grievances of $40,000 is too low. It cannot be circumvented by litigating in a manner outside the regime established by Parliament. In my view, if the limit is too low, that is a matter for Parliament to correct.

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9 [2025] FJCA 70; ABU 091.2023 (22 April 2025)

10 [2023] FJHC 805; ERCC 02.2019 (25 October 2023)

[30] I do not consider the present dispute to involve important questions of law, or that it is in the public interest for the jurisdictional issues between these parties to be determined, such that these considerations can be said to be "strong reasons" for leave to not be required. In my view, the law is settled by this Court's decision in *ANZ v Sharma*, and has been appropriately applied in *Capital Insurance Limited v Kumar*. Nor do I see, in the circumstances of this case, any need to override the requirement for leave pursuant to section 17 of the Court of Appeal Act 1948.

[31] I am mindful of the delays in this matter. Had an application for leave been made initially, prior to this Court's decision in *ANZ v Sharma*, I consider it highly likely leave would have been granted (Mr Apted indicated that he would not have opposed leave), and the issues Mr Kant wished to argue would have been heard and dealt with prior to the subsequent cases, referred to earlier, being determined. Indeed, it is difficult to understand the deliberate decisions, on numerous occasions, by Mr Redfern to not seek leave to appeal, despite having numerous opportunities to re-consider, and each such decision being made in the face of the Supreme Court's advice that when in doubt an application should be made. The delays have resulted from the failure to apply for leave.

[32] I am also mindful that Mr Redfern's remedy for what he considers wrongful termination will not now end – he can start again.

E. Conclusion

[33] On the preliminary point of law, I find that Mr Redfern has not obtained leave to appeal an interlocutory order as required. Accordingly, this Court has no jurisdiction to entertain his appeal. The appeal is incompetent and is dismissed.

Orders of the Court:

1. The appeal is dismissed.

2. Costs in the modest sum of FJD$2,500 are to be paid to Wyndham within 21 days. The obstinance shown in not applying for leave has caused considerable additional effort and expense for Wyndham, who have acted properly and fairly throughout. The award is modest as I consider it highly likely Mr Redfern had conducted this litigation in the manner described on advice; and yet he will remain dissatisfied after the length of time and the expense involved, without the matter being fully aired.

The Hon. Mr. Justice Chandana Prematilaka
RESIDENT JUSTICE OF APPEAL

COURT OF APPEAL FIJI

The Hon. Mr. Justice Alipate Qetaki
RESIDENT JUSTICE OF APPEAL

The Hon. Mr. Justice Gus Andrée Wiltens
JUSTICE OF APPEAL

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AG's Chamber for the Appellant
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