IN THE COURT OF APPEAL, FIJI
On Appeal from the High Court of Fiji at Suva

CIVIL APPEAL NO. ABU 0017/2023
High Court Civil ERCC Case No. 11/2019

BETWEEN **VIJAY KUMAR**

Appellant

AND **UNIVERSITY OF FIJI**

Respondent

Coram **Prematilaka, RJA**
Dobson, JA
Winter, JA

Counsel **Mr. D. Nair and Mr. S. Dean for the Appellant**
Mr. A. Sudhakar and Ms. A.S. Ali for the Respondent

Date of Hearing : **4 July 2025**

Date of Judgment : **25 July 2025**

JUDGMENT

Prematilaka, RJA

[1] I agree with reasons, conclusions and orders.

Dobson, JA

Introduction

[2] This appeal arises in an employment dispute between the appellant (Mr Kumar) and his former employer, the respondent (UoF, the University). There has been no consideration of Mr Kumar's substantive complaint because of a dispute over the jurisdiction of the Employment Relations Court to hear it. In the judgment under appeal, Madam Justice Wati accepted the UoF's objection that s 173(4) of the Fiji Constitution ousted that Court's jurisdiction to hear the claim. Mr Kumar seeks reversal of that outcome.

Factual background and the proceedings in the Employment Relations Court

[3] Mr Kumar was employed by UoF as a human relations manager from 3 July 2017 until his employment was terminated on 27 April 2019. In a statement of claim filed in the Employment Relations Court in July 2019, Mr Kumar pleaded that an investigation into his conduct in late 2018 had exonerated him, but that he was advised in March 2019 that there was to be a review of that investigation. That led to the UoF summarily dismissing him the following month.

[4] The statement of claim pleads that UoF breached its employment contract with Mr Kumar by arbitrarily terminating the employment without exhausting the disciplinary procedures contained in the contract, and by contravening the termination clause in the contract providing for the circumstances under which the employment could be terminated.

[5] As to UoF's conduct in relation to its termination decision, Mr Kumar also pleaded breaches of the contract as follows:

(a) that the UoF acted in bad faith by relying upon reasons for termination which were not proven against Mr Kumar and upon the allegation on which Mr Kumar had previously been exonerated;

(b) that the UoF acted in bad faith by fabricating evidence against him;

(c) that the UoF failed to give Mr Kumar the right to cross-examine the persons who had made adverse reports or complaints against him.

[6] After the proceedings reached the trial stage in the Employment Relations Court, UoF filed an application seeking strike out of the claim on the ground that the Court did not have jurisdiction to hear it. This was on the basis that its decision as employer to terminate Mr Kumar's employment was one taken under the University of Fiji Act 2011, and as such the decision was one in respect of which s 173(4)(d) of the Constitution of Fiji ousted the Court's jurisdiction.

[7] In a ruling delivered on 16 February 2023, Madam Justice Wati accepted the UoF contention and terminated the proceedings on the ground that the Employment Relations Court did not have jurisdiction.[1]

[8] Section s 173(4)(d) of the Constitution provides:

> Preservation of laws
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> …
>
> (4) Notwithstanding anything contained in this Constitution, no court or tribunal (including any court or tribunal established or continued in existence by the Constitution) shall have the jurisdiction to accept, hear, determine, or in any other way entertain, or to grant any order, relief or remedy, in any proceeding of any nature whatsoever which seeks or purports to challenge or question—
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> …
>
> (d) any decision made or authorised, or any action taken, or any decision which may be made or authorised, or any action which may be taken, under any Promulgation, Decree or Declaration, and any subordinate laws made under any such Promulgation, Decree or Declaration (including any provision of any such laws), made or as may be made between 5 December 2006 until the first sitting of the first Parliament under this Constitution, except as may be provided in or authorised by any such Promulgation, Decree or Declaration (including any provision of any such laws), made or as may be made between

[1] *Kumar v University of Fiji* ERCC 11 of 2019, Ruling 16 February 2023.

5 December 2006 until the first sitting of the first Parliament under this Constitution.

[9] The UoF Act came into force as a decree in 2008 and is now referred to as the University of Fiji Act 2011. The Employment Relations Court reasoned that the UoF action in dismissing Mr Kumar was a decision made under a relevant "Promulgation, Decree or Declaration" for the purposes of s 173(4)(d) of the Constitution:[2]

> "An appointment and removal of a staff of the University is made under s 6(1) of the University of Fiji Act 2011. Consequently, it is only under s 6(1) of the University of Fiji Act 2011 that the plaintiff could have been appointed or removed."

Was the dismissal made under the UoF Act?

[10] A preliminary issue is whether UoF's conduct in employing and terminating the employment of Mr Kumar were decisions made under its Act. The section relied on by the UoF in this case, and as accepted by the Judge, is in s 6(1) of its Act in the following terms:

> Powers of the University
>
> 6 The University shall have power to –
>
> …
>
> (i) appoint persons to and to remove them from such office instituted, to prescribe the conditions of service of staff and to provide for their discipline;

[11] However, the statutory establishment of the University is provided for in s 4, subs (3) of which provides:

> (3) The University shall be a body corporate with perpetual succession and a common seal by the name and style of "The University of Fiji" with power and capacity in that name to undertake the following–
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> …

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2 *Kumar v University of Fiji*, above n 1, at [4].

> (c) to enter into contracts, to appoint agents and attorneys, to engage consultants, to fix charges and other terms for services and other facilities it supplies; and

[12] Mr Sudhakar submitted for the University that the general power to enter into contracts in this part of the provision establishing its legal identity excludes contracts of employment because the power in relation to such contracts is explicitly provided for separately in s 6(i). We are not persuaded that such an exclusion should be read into the University's general power to enter into contracts of all types deemed appropriate for its orderly management. A body corporate such as a university could not operate without a range of employees, so the power to contract with them is a stock part of providing for its lawful operation.

[13] The provision in s 6(i) of its Act is preceded by the following:

> (h) institute professorships, associate professorships and lectureships and other offices of any kind as the University may consider appropriate;

[14] There is also separate provision in ss 7 to 11 for the creation of the offices of Chancellor, Pro-Chancellor, Vice-Chancellor and Registrar.

[15] The status of professors and other positions recognising academic standing, as well as the defined offices in ss 7 to 11, involves an additional consideration to the extent that bestowing such status is a component of the University's dealings with the outside world. Decisions on such appointments carry implications in the holding out of academic status for both the university and those appointed to such positions. A part of those responsibilities is regulating their behaviour, which warrants the explicit power to prescribe the conditions of service for staff and to provide for their discipline. That is hardly necessary to authorise inclusion of appropriate terms in contracts for the more usual employees in their work in all other aspects of the University's business. The employer's status as a University does not distinguish it from the position of all other employers, for the reminder of employees who carry out similar tasks to equivalent employees of companies and individual employers. Such employees' conditions are adequately provided for in employment contracts, including relevantly Mr Kumar.

[16] It follows that the decision to terminate Mr Kumar's employment was not one made under the University's Act. That is sufficient to dispose of the appeal. However, given the focus placed by the parties on the scope of the ouster provision in s 173(4) of the Constitution, and the potentially wider importance of it, we record our views on its scope and current application.

Approach to the interpretation of s 173(4) of the Constitution

[17] Counsel's written submissions did not address in any detail the context in which s 173 was included in the Constitution. After discussion during the hearing, the agreed position was that after the militarily enforced change of government on 5 December 2006, laws were made by government Promulgations until April 2009 (when the government purported to abrogate the existing Constitution) and from then until the first sitting of Parliament on 6 October 2014 by Decrees.

[18] The mischief addressed in s 173(4) of the Constitution was the concern that the legitimacy of laws imposed by means of Promulgation and Decrees between 5 December 2006 and the first sitting of a new Parliament (the relevant period) ought not to be vulnerable to judicial challenge. Accordingly, subs (4)(a) prohibited any challenge to the validity or legality of any promulgation, decree or declaration, subs (4)(b) prohibited challenges to the constitutionality and subs (4)(c) prohibited challenges on grounds that the content of such laws was inconsistent with the Constitution.

[19] In each case, those prohibitions are open-ended as to time and accordingly until they are abrogated by some means, the lawfulness of laws imposed in the relevant period is not able to be challenged by court proceedings. While laws were still being imposed by means of Decrees, it is understandable that the drafters of the Constitution would want to protect those laws from collateral attack in proceedings brought to challenge decisions made under such laws. It is not clear that this extent of " belts and braces" protection of the status of those laws still required this fourth level of protection once that mode of creating laws come to an end.

[20] As to other provisions in the Constitution that might influence a proper interpretation of s 173(4), the first point is that the subsection begins with the words "Notwithstanding anything contained in this Constitution", which signals that it is to take priority over any other sections that might appear inconsistent with s 173(4). However, the extensive provisions in Chapter 2 of the Constitution providing a Bill of Rights for all Fijians includes, in s 15(2), the right of every party to a civil dispute to have the matter determined by a court of law or, if appropriate, by an independent and impartial tribunal. To the extent the ouster provision in s 173(4)(d) abrogates that right expressly provided for in s 15(2) of the Constitution, then the extent of abrogation ought to be confined as narrowly as a reasonable interpretation of the inconsistent removal of rights allows.

[21] More broadly, the courts generally adopt a narrow interpretation to privative provisions that purport to oust the jurisdiction of the courts. This is reflected in decisions where parties seeking judicial review of executive action are met with legislative provisions that purport to exclude the prospect of judicial review by the courts.[3]

[22] With those influences on the approach to interpretation in mind, we come to the wording of s 173(4)(d) of the Constitution itself. The provision is set out at [8] above.

[23] The Judge interpreted the provision in the following paragraphs:

> *" 7. It is very clearly spelt out in the above section that the laws that comes within the ambit of the above provisions are the laws made between 5 December 2006 and the first sitting of Parliament (6 October 2014).*
>
> *8. Is there a timeline for the decisions as well? The above provision encompasses all decisions that are made or that may be made in future under the laws made in the operational period. The section does not exclude decisions made outside the period between 5 December 2006 and 6 October 2014".*[4]

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[3] See, for example, *Padfield v Minister of Agriculture* [1968] AC 997, *Anisminic Ltd v The Foreign Compensation Commission* [1969] 2 AC 147 and *Bulk Gas Users Group v The Attorney-General* [1983] NZLR 129.

[4] ***Kumar v University of Fiji*** [2023] FJHC 72; erc 11.2019 (February 2023)

[24] There are two options as to the scope of the ouster contemplated by this provision. First, that it relates to decisions made under any laws that were imposed in the relevant period, but not to decisions made thereafter. The second alternative, as adopted in the decision under appeal, is that it relates to decisions whenever made into the future, which are made under the laws imposed in the relevant period.

[25] Section 174(4)(d) uses the word " made" to define the scope of two, and potentially three different classes;

a) First, the extent of laws protected by ss4, namely those made within the relevant period;

b) Second, the time period during which any laws were made that included an authorisation or provision enabling a challenge to be brought, that would otherwise be prohibited by the ouster of courts' jurisdiction (i.e. the exception beginning with the words…." Except as may be……") ;

c) arguably, third, the time period during which decisions under those laws were made and which are protected from challenge by this provision.

[26] Consistency with the scope of protections against challenge for laws imposed during the relevant period in paras (a), (b) and (c) would suggest that the ouster of the Courts' ability to challenge decisions made under them would similarly continue to apply after the end of the relevant period. The consequence of that wider interpretation required Mr Sudhakar to maintain that any employee of UoF with an employment dispute would be without any means of contesting it until Parliament enacted an exception to s173(4)(d) to recongise an entitlement to do so.

[27] We are able to avoid that outcome by finding that the University's general capacity to conduct business, including entry into employment contracts is a function of its status (under s4 of its Act) as a body corporate so that it is not exercising a statutory power under s6 of its Act every time it employs anyone, or dismisses them. However, the stance adopted by the University is an unattractive proposition and not one that should be adopted without an express prohibition extending beyond

the resumption of parliamentary legislative powers. Employment disputes such as Mr Kumar's case proceed on the basis that the lawfulness of the law under which the decision was made is not in dispute.

[28] We see no reason why a human relations manager employed by the University who claims a breach of his employment contract should be in any different position to a human relations manager employed by the commercial entity that owes its legal identity to registration as a company under a Companies Act. Both employers depend on a statute for their separate legal identity.

[29] There is no incentive for claimants challenging their dismissal as employees to include unnecessary and irrelevant allegations that the law under which their employer was given its legal status is in some way not a valid part of the laws of Fiji. Given the continued application of s173(4)(a),(b) and (c), litigants would in any event know that such claims would be futile as they would be vulnerable to strike out as contrary to those provisions.

[30] The intention of the drafters of the Constitution was to protect the legitimacy of laws imposed in the relevant period from judicial challenge. Their intention cannot have extended to an open ended ban on challenges made to decisions made under those laws, where the legitimacy of the law in question is not raised as an issue. If such a widesweeping ouster was intended, then it is unlikely that s15(2) of the Constitution would have been cast in terms that it was. While we do no need to decide the point, in deference to the arguments we heard, we incline to the view that the references to "made" on s173(4)(d) qualify all there of the classes to which that word relates, including the period in which unchallengeable decisions were made.

[31] In suggesting that interpretation of the ouster in s173(4)(d), we need to acknowledge the decision of this Court in **One Hundred Sands Ltd v The Attorney-General** of Fiji,[5] as relied on by Mr Sudhakar.

[5] *One Hundred Sand Ltd v The Attorney-General of Fiji* Civil Appeal Nos ABU 27 and 31 of 2015, Ruling 23 February 2017.

[32] Those proceedings commenced as an application for leave to apply for judicial review brought by One Hundred Sands Limited to challenge the decision of the Attorney-General made to revoke a casino gambling licence that had been granted to the appellant in March 2012. The grant of the licence had been made pursuant to the provisions of the Gaming Decree of 2009, and the revocation decision (made in February 2015 after the first sitting of Parliament) similarly relied on powers granted to the Attorney-General to do so.

[33] The statutory context of the assessment of the scope of s173(4)(d) was somewhat different in the *One Hundred Sands* decision in that powers both to grant and subsequently to revoke a gaming licence depended directly on the exercise of powers in the Gaming Decree. In contrast, our primary ground for granting this appeal is that the decision of the University sought to be challenged by Mr Kumar does not depend on the exercise of the identified statutory power by the University.

[34] In the High Court, the Judge held that the Court did have jurisdiction, addressing the point in the following terms:

> *"4 (a) The wording of section 173(4)(d) of the Constitution, only precludes the Court from hearing and granting relief with regard to decisions made during the period. Since the decision was made on 9 February 2015, it is clearly outside of ambit of section 173(4)(d) having been made after the end of the period on the 6th October 2014.*
>
> *(b) The decision was not illegal because the Respondent correctly understood the law and applied it. He was entitled under section 39(1) of the Decree to revoke the licence for breach of condition, and he did so. The breaches of conditions and clauses were cited in the decision.*
>
> *(c) The decision was a rational one and justified in the circumstances because the Respondent had cited chapter and verse of all the failures of the Applicant to comply with the terms of the licence.*
>
> *(d) There was no procedural impropriety because no clause in the licence can override a provision of an applicable law."*

[35] The Attorney-General pursued what was in effect a cross-appeal challenging the High Court Judge's finding on the scope of s173(4)(d). It was contended for the Attorney-General that the prohibition on any challenge extended to all decisions, whenever made (including after first sitting of Parliament) where they had been made under the Gaming Decree of 2009. That cross-appeal succeeded.

[36] Despite recognising the prospect of the interpretation that the High Court had preferred (and with which were inclined to agree), the Court of Appeal reasoned that the continuing application of s173(4)(a), (b) and (c) after the first sitting of Parliament would be undermined if the effect of (d) came to an end after Parliament sat:

> " [19] The four sub-sections (a), (b) ,(c) and (d) cover different aspects of Decrees etc made during the said period, Sub0section (a) refers to the **validity or legality**, subsection (b) refers to **the constitutionality** , sub-section (c) refers to **the Decrees being inconsistent with the Constitution**. The prohibition applies to these aspects of the Decrees. Sub-section (d) refers to **decisions taken or made** under such Decrees. In interpreting these subsections, the same meaning has to be attributed to them and the period specified in the different sections would refer to the Decrees made during the said period so that decisions taken or made under such decrees should get the same exemptions as otherwise it would open up an area where such decisions taken or made under such decrees become the subject of challenge which would in turn make it possible to question the Decrees themselves, which is what is prohibited under these provisions in section 173(4)(d) of the Constitution.
>
> [20] In such a situation the adoption of the literal rule would not assist to get at the true import of the Legislature and a different interpretation should be utilized. What was intended to be avoided by section 173(4)(d) was the canvassing of the Decrees referred to therein and it would be meaningless if actions taken under such Decrees were not given the same coverage. The use of the mischief rule would assist in giving the true meaning of the section by giving it a meaning which would convey the true import of the section which is to cover the Decrees referred to therein giving a total coverage including decisions taken or made under such Decrees".

[37] The reasoning in One Hundred Sands appears to have proceeded on the assumption that any challenge to a decision made under a law imposed in the relevant period should be treated as extending to a challenge to the validity, legality, or constitutionality of the law under which the relevant decision was made. That did not appear to be the case in One Hundred Sands and is certainly not the case in the present appeal.

[38] We appreciate that context will always be relevant in determining the potential application of the ouster provisions in s173(4) of the Constitution and leave a definitive ruling on its scope to a case which it arises directly.

Result

[39] We find that the relevant decision was not taken by UoF pursuant to s6 of its Act. As a body corporate with perpetual succession the University has a range of powers including entering and terminating contracts, that do not involve the exercise of specific powers provided for it under its Act. The jurisdiction of the Employment Relations Court is accordingly not ousted by s173(4)(d) of the Constitution.

[40] The appeal is allowed. The appellant's proceeding is referred back to the Employment Relations Court for substantive determination.

Winter, JA

[41] I agree with the judgment of Dobson JA.

Orders of the Court:

1. *Appeal is allowed.*
2. *Respondent is directed to pay costs of $5000.00 to the Appellant within 21 days hereof.*

Hon. Mr. Justice Chandana Prematilaka
Resident Justice of Court of Appeal

COURT OF APPEAL FIJI

Hon. Mr. Justice Robert Dobson
Justice of Appeal

Hon. Mr. Justice Gerard Winter
Justice of Appeal

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