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

CIVIL APPEAL NO. ABU0071/2020
[High Court Judicial Review HBJ No. 4/2020]

BETWEEN : **PERMANENT SECRETARY FOR EDUCATION, HERITAGE AND ARTS**

Appellant

AND : **ARVIND KUMAR**

Respondent

Coram : **Prematilaka, RJA**
Morgan, JA
Andrews, JA

Counsel : **Ms O Solimailagi, for the Appellant**
Mr D Nair, for the Respondent

Date of Hearing : **7 November 2025**

Date of Judgment : **28 November 2025**

JUDGMENT

Prematilaka, RJA

[1] I agree with Andrews, JA in the reasons and conclusion that the appeal be allowed subject to costs.

Morgan, JA

[2] I have read and concur with the Judgment of Andrews, JA.

Andrews, JA

Introduction

[3] By a letter dated 11 March 2020 ("the dismissal letter"), the appellant summarily dismissed the respondent from his position as Manager Performance and Discipline in the Human Resources Unit of the Ministry of Education, Heritage and Arts ("the Ministry"). On 7 April 2020, the respondent applied to the High Court for leave to apply for Judicial Review of the decision to dismiss him.

[4] The appellant has appealed against the judgment of his Lordship Justice Amaratunga, delivered on 7 August 2020, granting leave ("the High Court judgment").[1]

Factual background

[5] The respondent entered into a three-year contract of service with the Ministry on 15 October 2018 ("the employment contract"), and commenced work on 3 December 2018. Clause 10 of the employment contract provided:

> ***10. Dismissal for misconduct or breach of any terms of the contract***

[1] *State v Permanent Secretary for Education, Heritage and Arts, ex parte Arvind Kumar* [2020] FJHC 637; HBJ4.2020 (7 August 2020).

> *The Officer may be summarily dismissed under this contract if after reasonable enquiries the Permanent Secretary is satisfied that the Officer is guilty of misconduct or a breach under this contract. Upon such dismissal all rights and privileges accrued to the Officer under this contract will be forfeited with the exception of the rights and privileges established under the General Orders.*

[6] In September 2019, the Ministry received a complaint of inappropriate behaviour (sexual harassment) against the respondent ("the complaint"). The respondent was advised of the complaint in a letter dated 30 September 2019. He was told that the allegations would be investigated and that his cooperation and participation in the investigation was required. He was also advised that he was suspended on full pay.

[7] A preliminary report on the allegations was prepared by the Ministry in October 2019. The report included written statements from female staff. As a result of the preliminary report, an Investigation Panel of three persons was appointed to conduct an investigation into the allegations, in accordance with Fijian Civil Service Discipline Guideline 2017 ("the Discipline Guideline"). The respondent was interviewed in the course of the investigation, as were ten other persons. The respondent also provided a written statement regarding the allegations.

[8] In its Report, the Investigation Panel recorded that the respondent had denied the allegations and said that his actions were "in a fun context", but concluded that the allegations were well founded. The Investigation Panel recommended that the appellant institute disciplinary action against the respondent, in accordance with cl 9(9.1) of the Discipline Guideline, which provides:

> *9 REMOVE AN EMPLOYEE*
>
> *9.1 The Permanent Secretary, in agreement with their Minister may remove any contracted employee in accordance with the terms of their contract and having complied with the principles of Natural Justice and confirmed a case to answer in accordance with Section Six of this guideline.*

[9] On 9 January 2020, the appellant issued a "Show Cause Notice" to the respondent. The "Show Cause Notice":

[a] set out the allegations made against the respondent;

[b] recorded that the Investigation Panel had considered the evidence obtained during the investigation and determined that the allegations were substantiated, and there was a case for the respondent to answer;

[c] stated that the appellant wished to give the respondent another chance to present any information he felt was relevant to the allegations and why his contract should not be terminated; and

[d] advised that the respondent was to provide a written response by 15 January 2020 in order for a decision to be made.

[10] The respondent responded on 13 January 2020. He said:

[a] The allegations against him were fabricated, and he had not violated the dignity or morality of any female employee.

[b] He had served the Public Service for more than 25 years, and had an unblemished record.

[c] In his view, the allegations were instigated by certain employees who were subject to disciplinary action in the Ministry, and due to his effective prosecution the charges were proven against them. He said the consolidated manner in which the allegations were made showed that some staff had conspired against him to tarnish his career. He said the Ministry had a sexual harassment policy to address such a situation, but none of the employees had pursued that process, and this confirmed that the allegations made against him were instigated to tarnish his career.

[d] He had always respected the dignity and morality of women, and in his previous position in the Ministry of Health he had interacted with female staff, with no complaints on his behaviour.

[e] The allegations had been taken out of all proportion in the working environment. Staff always interacted in an amicable manner. He did not have any intention to cause discomfort, however as Manager Performance and Discipline, he had on many occasions corrected the attitude and behaviour of staff.

[11] Prior to issuing the dismissal letter, the appellant reported to the Minister for Education, Heritage and Arts and obtained the Minister's endorsement of the dismissal.

Application for leave to apply for judicial review

[12] On 9 April 2020, the respondent applied to the High Court for leave to apply for judicial review of the decision to terminate his employment, pursuant to O53r3 of the High Court Rules. The respondent sought the following relief:

[a] an order of certiorari to quash the decision;

[b] an order of mandamus directing his immediate reinstatement;

[c] a declaration that the decision was in breach of the principles of justice and procedural fairness; and

[d] a declaration that the decision was irrational, arbitrary, unreasonable, inconsistent, tainted with bias, and ultra vires.

[13] The respondent's grounds for seeking leave may be summarised as follows:

[a] The decision to terminate the respondent's employment was contrary to natural justice, in that the appellant:

[i] failed to comply with reg 22(2) and (3) of the Civil Service Regulations 1999 before terminating his employment;

[ii] failed to give him the right to cross-examine persons who had made adverse reports;

[iii] failed to disclose the investigation report relied upon; and

[iv] failed to serve disciplinary charges identifying particular provisions of the Civil Service Code of Conduct alleged to have been breached, with specific particulars of the alleged offence, including dates and names.

[b] There was procedural impropriety: the appellant failed to comply with the Discipline Guideline, the Civil Service Discipline Regulations 2009, and s 120(9) of the 2013 Constitution, as to specific procedures relating to the instigation of disciplinary action.

[c] The decision to terminate the respondent's employment was manifestly harsh and disproportionate and contrary to s 16(a) of the 2013 Constitution.

[d] The decision-making process in terminating the respondent's employment lacked transparency and impartiality as the appellant executed the role of judge, jury and executioner when she arbitrarily appointed the investigating panel, and the process thereafter was tainted with bias.

[e] The decision was so unreasonable that no reasonable decision-making body could have made it if it had taken into account relevant factors.

[f] The appellant acted in breach of the respondent's legitimate expectations when she failed to accord procedural fairness and the right to be heard at every process in the disciplinary action before terminating his employment.

[14] The appellant filed a Notice of Opposition to the application for leave on the grounds (in summary) that:

[a] The respondent did not have any arguable case for leave to apply for judicial review, as the decision to summarily dismiss him arose out of an employment relationship which was private in nature and not susceptible to judicial review.

[b] The appellant had authority to appoint, remove and institute disciplinary action against Ministry employees, including to terminate an employee's employment.

[c] Under s 33(1)(a) and (b) of the Employment Relations Act 2007 ("the ERA"), the appellant had power to summarily dismiss an employee for gross misconduct.

[d] The respondent's employment contract also allowed the appellant to summarily dismiss him, if after reasonable enquiries she was satisfied he was guilty of misconduct or a breach of the contract.

[e] Following the complaint, the appellant appointed an investigation panel to investigate the allegations, in the course of which the respondent was interviewed.

[f] The respondent was suspended on full pay during the investigation.

[g] The respondent was informed of the outcome of the investigation and given the opportunity to submit any other information in relation to the allegations, and the respondent responded accordingly.

[h] The appellant, being satisfied that the respondent was guilty of the allegations of sexual harassment, exercised her authority to summarily dismiss him. The penalty was proportionate to the nature of the allegations.

[i] The appellant's authority to terminate an employee's employment is separate and distinct from the authority to institute disciplinary action against an employee. Referral of disciplinary action to the Public Service Disciplinary Tribunal is not mandatory.

The High Court judgment

[15] The High Court Judge stated the issues to be determined on the application for leave to apply for judicial review as being:[2]

[a] whether the public law remedy of judicial review is available to the respondent; that is, whether the decision to summarily dismiss the respondent arose out of an employment contract between the respondent and the Ministry, which was private in nature, rather than being a matter of public law; and

[b] whether an alternative remedy was available to the respondent under the ERA, pursuant to which the respondent could have sought redress for termination, which he had failed to exercise.

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2 High Court judgment, at paragraph 13.

[16] On the first issue (whether judicial review was available to the respondent), the Judge noted that the appellant relied on the judgment of this Court in *The Ministry and Permanent Secretary for the Ministry for Education v Prakash*.[3] In that judgment, this Court held that whether an employee of a public authority is entitled to invoke the public law remedy of judicial review depends on whether there were special statutory restrictions governing the employment, or whether there are regulatory or statutory underpinnings to the employment. This Court further held that if there were no such statutory restrictions or underpinnings, there is only a master/servant relationship, governed by the respective contract of employment. The Judge noted that this Court found that Mr Prakash had entered into a contract of employment, therefore any breach of contract fell under realm of private law.

[17] The Judge considered what is meant by the terms "statutory underpinning" or "statutory restrictions". He noted that the respondent's employment was "primarily dependent on the employment contract", but said that "one cannot stop at that point and refuse to grant leave for judicial review".[4]

[18] The Judge recorded the appellant's submission that the respondent was summarily dismissed under cl 10 of contract. The Judge described cl 10 as "the most drastic provision … hence checks and balances are equally paramount in the exercise of such provision", and said that it can only be applied after "reasonable enquiries" by the appellant, which (according to the appellant) were conducted in terms of the Discipline Guideline. The Judge went on to say that the Discipline Guideline was "issued in terms of ss 123(h) and 127(7) of the Constitution."[5]

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3 *The Ministry and the Permanent Secretary for the Ministry of Education v Prakash* [2011] FJCA 53; ABU32.2009 (25 November 2011).

4 High Court judgment at paragraph 16.

5 At paragraphs 17-20.

[19] The Judge stated that:[6]

> *This procedure can be subjected to judicial review in terms of the above-mentioned provisions of law.*

[20] The Judge found that what may be considered "misconduct" (as that word is used in cl 10 of the contract) is not specifically dealt with in the contract, or in the Discipline Guideline. Therefore, he concluded, the interpretation of cl 10 and the word "misconduct" is not a private issue between master and servant.[7]

[21] The Judge then referred to the judgment of this Court in *Palani v Fiji Electricity Authority*,[8] which upheld a High Court judgment refusing leave to apply for judicial review of an employee's dismissal under an employment contract. The Judge commented that:[9]

> *If [the appellant's] contention is admitted, any dismissal can be made in terms of Clause 10 and the aggrieved party cannot seek redress by way of judicial review, even in denial of natural justice. What is "reasonable enquiry" in terms of the said clause 10 of the employment contract is an exercise of discretion and that was subjected to Disciplinary Guidelines issued in terms of Sections 123(h) and 127(7) of the Constitution of the Republic of Fiji. This can be done only upon finding of "guilty* ***of misconduct****" under said clause. The application of summary dismissal needs to be applied in reasonable manner by the [appellant], which can be subjected to judicial review.*
>
> *... What is paramount is* ***not the type of employment,*** *but the* ***mode of exercise of discretion by the authority to dismissal.***
>
> (Emphasis as in original)

[22] The Judge continued:[10]

> *Having a contract was not determinative as contended by the [appellant]. Any position in the government can be subjected to a contract, but that alone will not exclude judicial review.*

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6 At paragraph 21.
7 At paragraphs 22-23.
8 *Palani v Fiji Electricity Authority* [1997] FJCA 21; ABU28.96 (18 July 1997).
9 High Court judgment, at paragraphs 26-27.
10 At paragraphs 28-29.

> *If there is no clear demarcation of only a master and servant relationship in the employment contract, it is not safe to deny judicial review. In my judgment on the material before me at this stage, [the respondent] is entitled for leave to judicial review.*

[23] The Judge recorded that it was "undisputed" that the respondent was a civil servant employed by the Ministry under a contract, but went on to record that the contract allowed summary dismissal for "misconduct" after "reasonable enquiry". The Judge found that what is "reasonable enquiry" under the contract cannot be determined without considering a public law element, as the discretion to exercise the power to summarily dismiss an employee under cl 10 is vested in a public authority. The Judge held that the application of cl 10 of the contract cannot be considered as purely a private dispute that can be determined by the contract between master and servant.[11]

[24] Accordingly, the Judge rejected the appellant's contention that as the respondent's termination was under cl 10 of the contract, it could not be challenged through judicial review.[12]

[25] The Judge then considered the appellant's contention that an alternative remedy was available to the respondent, under the ERA. The Judge referred to s 3(1) of the ERA (which provides that the ERA applies to "all employers and workers in Fiji, including the Government, other Government entities, local authorities and the sugar industry"), and recorded that s 188(4) of the ERA allowed the respondent to file or lodge an employment "grievance" with the Employment Relations Tribunal or the Employment Relations Court. The Judge also recorded that, pursuant to s 185 of the ERA, "grievance" includes "dispute or rights involving dismissal or termination of workers", and that s 111 of the ERA allows a worker to pursue the grievance procedure.[13]

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11 At paragraphs 30-33.
12 At paragraph 38.
13 At paragraph 40-42.

[26] The Judge went on to find that those provisions:[14]

> *… are not overlapping and or substitute for judicial review. The scope of judicial review is not dealt with in the above provisions, hence cannot be considered as adequate alternative remedy to judicial review.*

[27] The Judge also found (by reference to O53r3(6) of the High Court Rules) that the availability of an alternative remedy is not itself a complete exclusion of judicial review. He found that:[15]

> *Alternative remedy should also be adequate for denial for judicial review. Having an alternative remedy itself is not sufficient to exercise discretion of the court for refusal of leave.*

[28] Finally, the Judge considered whether the respondent had established an arguable case for judicial review. The Judge recorded the respondent's challenge to the appellant's decision to terminate his employment, and the appellant's contention that he had been dismissed after reasonable inquiry into the alleged misconduct. The Judge also referred to O53r3(5) of the High Court Rules (which requires an applicant for leave to apply for judicial review to have a "sufficient interest in the matter to which the application arises").

[29] The Judge found that the respondent had an arguable case for judicial review, had sufficient interest in the matter, and that the matter was not frivolous or an abuse of process.[16] Accordingly, leave was granted.

Appeal to this Court

[30] The appellant set out 11 grounds of appeal, however counsel for both the appellant and the respondent grouped them for the purpose of submissions as follows:

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14 At paragraph 43.
15 At paragraph 44-45
16 At paragraphs 46-52.

[a] (Grounds 1 and 4-8): The appellant contended that judicial review is limited to matters of public law. In the respondent's case, the dismissal was under cl 10 of his employment contract, so was not amenable to judicial review. The appellant contended that the High Court Judge erred in finding otherwise.

[b] (Grounds 2, 3, and 9) The appellant contended that the grievance provisions under the ERA were available to the respondent, and supported by s 20(2) of the Constitution. The appellant submitted that the Judge was wrong to find that they were not an adequate alternative remedy to judicial review.

[c] (Grounds 10 and 11) The appellant contended that the Judge was wrong to find that the respondent had an arguable case for judicial review.

Did the High Court Judge err in finding that judicial review was available to the respondent to challenge his dismissal?

Submissions

[31] Ms Solimailagi submitted for the appellant that the Judge's finding, that the respondent's dismissal was not an issue of private law under the employment contract, was made on the basis that the "inquiry process" into the complaint was in accordance with the Discipline Guideline (which the Judge said was "issued in terms of s s 123(h) and 127(7) of the Constitution"[17]). In essence, she submitted, the Judge found that those provisions were the "statutory underpinning" or "statutory restrictions" which justified converting a private law matter into a public law matter.

[32] She submitted that the Judge's reasoning was legally flawed, in that:

[a] The inclusion of "the cultivation of good human resource management and career development practices, to maximise human potential" as one of the

[17] At paragraph 20.

"values and principles of State service" in 123(h) of the Constitution does not provide a sufficient basis for converting a contractual matter (the respondent's dismissal pursuant to the terms of the contract) into a public law matter.

[b] While s 127(7) of the Constitution gave the appellant authority to "appoint, remove, and institute disciplinary action against" Ministry staff, that is not a prerequisite for the appellant's contractual right to dismiss, once a valid and binding contract governing the terms of dismissal is in place. Ms Solimailagi submitted that in terminating the respondent's employment, the appellant was exercising her right to do so under cl 10 of the contract; she was not exercising a "statutory power".

[33] Ms Solimailagi also referred to s 33(1) of the ERA, which provides that no employer may summarily dismiss a worker, except in the circumstances specified in that section. She submitted that this "statutory restriction" cannot inject a public law element into all employment contracts of civil servants, including that of the respondent.

[34] Ms Solimailagi further submitted that judgments issued before the enactment of the ERA are no longer applicable, as the ERA introduced an entirely new regime. She submitted that it is clear (in particular from s 3 of the ERA), that Parliament intended the ERA regime to apply to all employer/employee relationships, with only a few defined exceptions.

[35] Mr Nair submitted for the respondent that there is "no dispute that the appellant is established under s 127(1) of the Constitution", and as such is a "public body", or that the respondent was at the time of his dismissal a "public officer", as he was holding a "public office". He submitted that the respondent was employed by the Government of Fiji, and the decision to terminate his employment was made by a public body. Mr Nair also submitted that the terms and conditions of the respondent's employment were subject to the Civil Service Act and Regulations 1999, and the Civil Service (General) Regulations 2017.

[36] He further submitted that under the Civil Service (General) Regulations, the appellant was required to refer the Investigation Report to the Public Service Disciplinary Tribunal ("the PSDT"), but failed to do so. He also submitted that the appellant was required to implement the penalty that the PSDT directed.

[37] Mr Nair submitted that the Judge correctly determined that the presence of these statutory elements and applicable Government policies converted a contractual private law issue into a public law issue.

[38] Mr Nair submitted that the categorisation of the respondent as a "public officer" was supported by the fact that it was accepted in the course of the investigation that the respondent was a career civil servant who had been employed in the civil service for more than two decades.

Discussion

[39] In support of her submission that there was no "statutory underpinning" or "statutory restrictions" which justified converting the respondent's dismissal under cl 10 of the employment contract from a private law matter into a public law matter, Ms Solimailagi referred to the judgment of the United Kingdom Court of Appeal in *R v East Berkshire Health Authority, ex parte Walshe*.[18] In that case, a senior nursing officer employed under a contract with the health authority was dismissed for misconduct. He applied for judicial review, seeking a writ of certiorari to quash the dismissal. The health authority raised a preliminary issue as to whether the subject matter of the application entitled him to apply for judicial review. The High Court Judge held that a writ of certiorari might be an appropriate remedy. The Court of Appeal was unanimous in allowing the health authority's appeal, holding that there was no public law element which would entitle the nursing officer to apply for judicial review.

[18] *R v East Berkshire Health Authority, ex parte Walshe* [1985] 1 QB 152.

[40] In support of his submission that the presence of statutory elements and Government policies converted a contractual private law issue into a public law issue, Mr Nair referred the Court to the judgment of this Court in *Prasad v Attorney-General.*[19] Mr Prasad was employed in the Ministry of Primary Industries. In 1985 he was charged with conspiracy to defraud but the prosecution was discontinued in 1991. Disciplinary charges were laid against him, but they were not heard. He was dismissed from his employment in 1992 (said to be effective from 1985). He filed a common law action for wrongful dismissal. His action was dismissed in the High Court, the High Court Judge taking the view that he should have applied for judicial review. Mr Prasad appealed to this Court, which dismissed his appeal.

[41] In its judgment on Mr Prasad's appeal, this Court cited the judgment of Lord Goddard CJ in the Queens Bench Division, in *Inland Revenue Commissioners v Hambrook*.[20] That case arose out of a personal injury claim. A tax officer (described as an "established civil servant") was injured when the motorcycle he was riding was in a collision with a motor car driven by Mr Hambrook. The Commissioners paid him sick pay for some ten months then issued proceedings (through the Crown) against Mr Hambrook for damages for loss of the tax officer's services. At issue was whether the Crown was entitled to bring an action in respect of the loss of the services of an "established civil servant". Lord Goddard considered the nature of the employment of an "established civil servant" and said that:[21]

> *... 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 an 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.*

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19 *Prasad v Attorney-General* [1999] FJCA 52; ABU058.1997 (27 August 1999).
20 *Inland Revenue Commissioner v Hambrook* [1956] 2QB 641.
21 At 654.

[42] Lord Goddard found in favour of Mr Hambrook, in part as a result of his finding that the tax officer's employment was not contractual, and in part on the basis that the Commissioners' payment was voluntary.[22] Lord Goddard's judgment was upheld by the Court of Appeal.[23]

[43] Mr Nair also referred to the statement of Lord Diplock in in the United Kingdom House of Lords in *O'Reilly & Ors v Mackman & Ors*,[24] which was cited by this Court in *Prasad*, that:[25]

> *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.*

[44] This Court's judgment in *Prasad* is not of assistance in determining the issue before us. First, *Prasad* was decided in 1999, thus predates the ERA by some eight years. Section 3 of the ERA provides that:

> *(1) Subject to subsection (2), this Act applies to all employers and workers in workplaces in Fiji, including the Government, other Government entities, local authorities, statutory authorities and the sugar industry.*
>
> *(2) This Act does not apply to members of the Republic of Fiji Military Forces, the Fiji Police Force and the Fiji Corrections Service.*

[45] Section 3 of the ERA clearly applies to the appellant (as an "employer") and to the respondent (as a "worker in … the Government"). No distinction is made in s 3 on the basis of a worker being "an employee of the Crown" or a worker employed under a contract of employment. As s 3 makes clear, the ERA applies to all

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22 At 655-656.
23 At 660-673.
24 *O'Reilly & Ors v Mackman & Ors* [1983] 2 AC 237, at 285.
25 *Prasad*, at page 3.

"employers and workers in workplaces in Fiji, including the Government …". For obvious reasons, this Court in *Prasad* could not consider the application of the statutory scheme introduced with the enactment of the ERA.

[46] Secondly, it is made clear in this Court's judgment in *Prasad* that (unlike the respondent in the present case) Mr Prasad did not have an employment contract. This Court said in *Prasad*:[26]

> *There was no contract between the appellant and the respondent, so that no question of private law arose*.

[47] Mr Nair's submission that the respondent was a "public officer", and for that reason entitled to pursue the public law remedy of judicial review proceedings must be rejected. Other than to point to the length of the respondent's employment in the civil service, he did not offer any reasoned basis for the submission.

[48] As Ms Solimailagi submitted, the respondent's employment was terminated under the provisions of cl 10 of his employment contract, which provided for summary dismissal for misconduct or breach of contract. The fact that the appellant's position as Permanent Secretary is established under the Constitution does not convert the respondent's dismissal into a matter of public law.

[49] Further, neither the incorporation of the "values and principles" set out in s 123(h) of the Constitution, nor the power given in s 127(7) of the Constitution, renders the termination of the respondent's employment a public law issue. If the respondent's proposition to the contrary were to be accepted, the consequence would be that all persons employed in the civil service under contracts entered into by permanent secretaries of ministries would be entitled to issue judicial review proceedings. Section 3(1) of the ERA makes it clear that this was not Parliament's intention. Rather, its intention was that employees of the civil service, like other employees (other than those specified in s 3(2)) fall under the ERA regime.

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[26] *Prasad*, at page 3.

[50] Accordingly, I conclude that the appellant has established that the High Court Judge erred in finding that the termination of the respondent's employment was a "public law matter" and erred in holding that judicial review of the termination was available to the respondent.

Did the Judge err in finding that proceedings under the Employment Relations Act were not an adequate alternative remedy to Judicial Review?

Submissions

[51] Ms Solimailagi submitted that the Judge further erred in holding that the respondent's dismissal does not fall within the scope of the ERA, with the consequence that the procedures set out in the ERA do not constitute an adequate alternative remedy to judicial review.

[52] Ms Solimailagi submitted that s.20 of the Constitution guarantees the right to fair employment practices, and Parliament has provided the right of redress for unfair practices by way of the ERA. She submitted that s 111 of the ERA expressly empowers employees to bring grievances over dismissals to the Mediation Service, the Employment Relations Tribunal and the Employment Relations Court. Ms Solimailagi also submitted that the Courts have consistently affirmed that where statutory remedies (such as under the ERA) exist, judicial review is inappropriate.

[53] Mr Nair submitted that the relief sought by the respondent is not available under the ERA or the grievance mechanism contained therein. When asked at the hearing of the appeal to provide details as to the relief said to be not available under the ERA, Mr Nair responded that the respondent could not obtain writs of certiorari or mandamus under the ERA regime. However, he conceded that the substance of the relief sought by the respondent (the quashing of the decision to terminate his employment, and the making of an order for his reinstatement) can be ordered in proceedings under the ERA. He also accepted that the process which resulted in the

respondent's dismissal can be examined under the ERA, in that "unfairness" is a grounds for proceedings under the ERA.

[54] Mr Nair also accepted that a further remedy is available to respondent, by way of a common law action for breach of contract.

Discussion

[55] Ms Solimailagi referred in her submissions to the judgments of Courts in Fiji in *Palani v Fiji Electricity Authority*,[27] *Permanent Secretary for Education, Heritage and Arts v Kumar*,[28] *State v Permanent Secretary for Education*,[29] *Ram Prasad v Attorney-General*,[30] and *Ministry and Permanent Secretary for Education v Prakash*.[31] In each of these judgments the respective Courts made, or upheld, findings that employment in the civil service does not convert a private law issue into a public law issue, and/or that where statutory remedies (such as under the ERA) exist, judicial review is not appropriate.

[56] Mr Nair's submission that the relief sought by the respondent cannot be obtained by any means other than an application for judicial review is misconceived. As is demonstrated by the provisions set out below, the relief the respondent claims can be sought by way of proceedings under the ERA.

[57] In s 4 of the ERA, the interpretation of the term "employment grievance" expressly allows for a grievance on the grounds that a worker has been dismissed:

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27 *Palani v Fiji Electricity Authority* [1997] FJCA 21; ABU0028.96 (18 July 1997).
28 *Permanent Secretary for Education, Heritage and Arts v Kumar* [2016] FJHC 346; HBJ15.2016 (29 April 2016).
29 *State v Permanent Secretary for Education* [2023] FJHC 680; HBJ15.2019 (20 September 2023).
30 *Ram Prasad v Attorney-General* [1999] FJCA 52; ABU0052.1997s (27 August 1999).
31 *Ministry and Permanent Secretary for Education v Prakash* [2011] FJCA 53; ABU0032.2009 (25 November 2011).

4 Interpretation

In this Act, unless the context otherwise requires—

...

employment grievance

means a grievance that a worker, may have against the worker's employer or former employer because of the worker's claim that—

(a)the worker has been dismissed;

...

[58] Section 109 of the ERA sets out the object of Part 13 the Act (which deals with employment grievances):

> *109 The object of this Part is to provide for grievance procedures for workers to pursue employment grievances either personally or through the assistance of a representative.*

[59] Section 111 provides that workers may pursue the grievance procedure:

> ***111 Right to use procedures***
>
> *(1) A worker who believes that he or she has an employment grievance may pursue the grievance procedure in person, and may be assisted by a representative. ...*

[60] Section 230 sets out the remedies available. In respect of a claim of unjustified or unfair dismissal, it provides (as relevant to the matter before us):

> ***230 Employment grievance remedies***
>
> *(1) ...*
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> *(2) If the tribunal or court determines that a worker has an employment grievance by reason of being unjustifiably or unfairly dismissed, the tribunal or court may—*
>
> > *(a) in deciding the nature and extent of the remedies to be provided in respect of the employment grievance, consider the extent to which the actions of the worker contributed towards the situation that gave rise to the employment grievance; and*
> >
> > *(b) if those actions so require, reduce the remedies that would otherwise have been decided accordingly.*

> *(3) If the remedy of reinstatement is provided by the tribunal or the court, the worker must be reinstated immediately or on such a date as is specified by the tribunal or the court and, notwithstanding an appeal against the determination of the tribunal or the court, the provisions for reinstatement must, unless the tribunal or the court otherwise orders, remain in force pending the determination of the appeal.*

[61] Further, as Mr Nair acknowledged at the hearing, another remedy available to the respondent, if he wished to challenge his dismissal, is a common law action for breach of contract.

[62] The respondent sought writs of certiorari and mandamus, effectively seeking to quash the decision to terminate, and to direct that he be reinstated. Those remedies are available under the ERA. I conlcude that the appellant has established that the High Court Judge erred in finding that there was no adequate alternative to an application for judicial review.

Did the High Court Judge err in finding that the respondent had an arguable case for judicial review?

Submissions

[63] In submitting that the Judge erred in finding that the respondent had an arguable case, Ms Solimailagi outlined the process that led to the respondent's dismissal: the complaint, internal investigation, investigation by the Investigation Panel, the "show cause" letter, report to the Minister, and dismissal letter to the respondent. The process has been summarised at paragraphs [6] to [11], above. She further submitted that the respondent had admitted the actions that were the subject of the complaint.

[64] Ms Solimailagi also referred the Court to the judgment of the Supreme Court in *Matalulu v Director of Prosecutions*,[32] as to matters to be considered in relation to an application for leave to apply for judicial review. Those matters include "whether the application discloses arguable grounds for review based on facts supported by affidavit." She submitted that the respondent had failed to present an arguable case for review based upon facts supported by an affidavit.

[65] Ms Solimailagi further submitted that the respondent had put no evidence before the High Court Judge, to establish that the appellant was required to refer all cases of discipline to the PSDT and that the provisions of the Civil Service Regulations did not come into play.

[66] Mr Nair submitted that the respondent clearly had an "interest" in the application for leave to apply for judicial review, as he was employed by the appellant, and his employment was terminated. He submitted that the respondent had an arguable case for judicial review as the allegations against him were not proven through an independent, impartial and transparent process. He submitted that the appellant was first required to refer the allegations to the PSDT, and then to implement the recommended disciplinary penalty, but the appellant had usurped the functions of the PSDT.

Discussion

[67] The respondent applied for leave to apply for judicial review. His application was supported by an affidavit. At this stage, the issue is whether the respondent has an "arguable case" for judicial review. It is not for this Court to determine whether the respondent's case is made out.

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[32] *Matululu v Director of Public Prosecutions* [2003] FJSC 2; [2003] FLR 129; CBV0002.199S (17 April 2003).

[68] It must first be noted that I do not understand Ms Solimailagi's submission that the respondent "admitted the actions that were the subject of the complaint" to be a submission that the respondent admitted the allegations of sexual harassment. As set out in paragraph [8], above, the Investigation Report recorded that the respondent denied the allegations and had said that his actions were "in a fun context".

[69] Mr Nair's submission that the appellant was "required" to refer the Investigation Report to the PTSD, and failed to do so, must be rejected. Regulation 23 of the Civil Service (General) Regulations 1999 provides, as relevant:

> ***23 Suspension***
>
> *(1) The permanent secretary may suspend an employee at any stage during the disciplinary process.*
>
> **…**
>
> *(5) Upon completing the investigation, the permanent secretary of the relevant ministry … may decide to institute disciplinary action by referring the case to the [PSDT].*
>
> …

[70] The word "may" in reg 23(5) ("… the permanent secretary … may decide to … refer the case to the [PSDT]" makes it clear that the appellant had a discretion to refer the respondent's case to the PSDT. She was not "required" to do so.

[71] As can be seen from reg 22(2) of the Civil Service (General) Regulations, if a case is referred to the PSDT, a Permanent Secretary must implement any penalty that the PSDT directs. That situation does not arise in the present case:

> ***22 Disciplinary action***
>
> *(1) If a disciplinary action is instituted against an employee, then the Public Service Disciplinary Tribunal upon being satisfied that the employee has breached the Civil Service Code of Conduct, may direct the permanent secretary to implement one or more of the following penalties—*
>
> *(a) terminate the employee's employment;*
>
> *...*
>
> *(2) A permanent secretary must implement the penalty that the Public Service Disciplinary Tribunal directs the permanent secretary to implement under subregulation (1).*

[72] Mr Nair's reliance on it being a requirement that the appellant refer the respondent to the PSDT, with which the appellant failed to comply, was misplaced. As a consequence, the respondent's argument that he has an arguable case is considerably weakened. I conclude that the appellant has established that the respondent has not presented an arguable case for judicial review.

Conclusion

[73] The question whether the respondent should have been given leave to apply for judicial review must include consideration of :

[a] whether, in the circumstances of this case, judicial review was available;

[b] whether an adequate alternative existed that ought to be pursued; and

[c] whether the respondent has presented an arguable case for judicial review.

[74] The appellant has established that the Judge erred in finding that judicial review was available, that there was no adequate alternative to judicial review, and that the respondent had presented an arguable case for judicial review. The appeal must therefore be allowed.

ORDERS:

(1) The appeal is allowed and the High Court judgment is set aside.

(2) The respondent is to pay costs to the appellant, summarily assessed at $5,000.00, to be paid within 21 days.

Hon. Mr Justice Chandana Prematilaka
RESIDENT JUSTICE OF APPEAL

COURT OF APPEAL FIJI

Hon. Mr Justice Walton Morgan
JUSTICE OF APPEAL

Hon. Madam Justice Pamela Andrews
JUSTICE OF APPEAL

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