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

CIVIL APPEAL NO. ABU 012 OF 2024
[Suva ERCC No. 27 of 2018]

BETWEEN : **DHIRENDRA PRASAD**

Appellant

AND : **MINISTRY FOR EDUCATION, HERITAGE AND ARTS**

Respondent

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

Counsel : **Mr. D. Nair for the Appellant**
: **Mr. T. Cagilaba for the Respondent**

Date of Hearing : **6 February, 2026**
Date of Judgment : **27 February, 2026**

JUDGMENT

Introduction

[1] The appellant joined the Public Service as a teacher in 1990, and progressed through various positions, ultimately being appointed as Head Teacher ED 4C at Ghandi Bhawan Primary School on 6 October 2015, on a three-year contract.

[2] On 31 March 2016, the appellant received a letter from the Permanent Secretary of the Ministry advising that he was suspended without pay while an investigation was

carried out into allegations made against him, which he categorically denied, that he had:

[a] been involved in the release of cash cheques as payment from the Free Education Grant of amounts in excess of $10,000 without the approval of the Ministry of Education;

[b] run the school canteen without a proper recording of monies;

[c] received donations without issuing receipts, and had falsified a time book;

[d] consumed kava on school premises and had insulted and humiliated school children.

[3] On 18 July 2016, the appellant was advised by letter that he was being given a "final warning", and that a penalty would be imposed, of demotion and transfer. On 19 July 2016, he was advised by letter that the penalty imposed was that he was to be demoted, to grade ED 9A, and posted to Vuda District school. He remained at that school until 9 February 2017.

[4] On 13 January 2017, the appellant requested a review by the Civil Service Reform Management Unit (CSRMU) of the process followed in the investigation carried out by the Internal Staff Discipline Board. He claimed that the process and the penalty imposed were not within the authority of the Permanent Secretary. The CSRMU review confirmed that the penalty was not within the Permanent Secretary's authority.

[5] The appellant was advised by a letter dated 9 February 2017 that he was to be reinstated to a substantive level post, and the Ministry would determine whether it would institute disciplinary action against him and, if so, the appropriate charges. The appellant reported to the Lautoka Education Office, and on 15 May 2017 he was posted to Amichandra Memorial School. On 4 July 2017 the appellant received a letter advising that he was suspended, effective as from 10 July 2017, for alleged abuse while he was Head Teacher of Gandhi Bhawan School. He was informed that the matter would be referred to the Public Service Disciplinary Tribunal ("PSDT"). Disciplinary charges

were referred to the PSDT on 7 July 2017. The appellant was appointed pursuant to a contract as Head Teacher at Amichandra Memorial School as from 13 August 2017.

[6] On 19 April 2018, the Permanent Secretary advised the PSDT that it intended to withdraw ten disciplinary actions referred to it, including the action against the appellant. The PSDT allowed the actions to be withdrawn.

[7] The appellant's contract expired on 5 October 2018, but he remained working. On 16 November 2018, the Permanent Secretary advised the appellant that following the conclusion of its further investigations, there was a case against him to be answered, and a decision had been made not to renew the appellant's contract.

[8] Following this advice the Appellant filed a Notice of Motion ("the Notice of Motion") in the Employment Relations Court ("ERC") seeking declarations:-

a) that the Respondent's decision not to renew the Contract was unlawful, unjustified and unfair,

b) that the failure to give the Appellant the opportunity to present his case after the finding of a case to answer was procedurally unfair, lacked impartiality and independence and was a breach of natural justice and;

c) that the findings of the panel that was constituted to determine the findings of the alleged misconduct against the Appellant were biased, lacked impartiality and independence;

and an order that the contract be renewed without any loss of benefits and entitlements.

[9] The Notice of Motion was supported by an affidavit sworn by the Appellant and the Respondent filed an affidavit in response.

[10] Before the hearing of the Notice of Motion the Respondent applied to the ERC to strike out the Appellant's Notice of Motion on the grounds that the Notice of Motion related to an employment grievance that failed to comply with Section 188(4) of the

Employment Relations Act (ERA") and therefore exceeded the jurisdiction of the ERA and was otherwise an abuse of the powers of Court.

[11] Following the hearing of the Respondent's application the ERC struck out the Notice of Motion in a decision delivered on the 29th of January 2024 ("the Decision")[1].

[12] The Appellant has appealed to this Court against the Decision. The appeal raises two issues:-

- Firstly whether the Appellant was required to seek leave to appeal against the Decision; and
- Secondly whether the Judge erred in ordering that the Notice of Motion be struck out for want of jurisdiction.

The Employment Relations Court Decision

[13] The Judge after noting the specific grounds in the Respondent's Summons to Strike Out namely:-

> "(i) The employment grievance involves Government which is an essential service and industry and, is therefore to be dealt with in accordance with Parts 13 and 20 of the Act, pursuant to section 188(4) of the Act[2];
>
> (ii) The employment grievance was not firstly referred for mediation services process in accordance with section 110(3) of the Act; and
>
> (iii) The application has therefore been prematurely brought before this Honourable Court and consequently exceeds the jurisdiction of this Court"

held:-

> *"8. Section 211 (1) (a) confers jurisdiction on the Employment Relations Tribunal to adjudicate an employment grievance, which is defined in section 185 of the Act. Section 220 of the Act concerns the jurisdiction of the Employment Relations Court. The section does not confer original jurisdiction on the court to adjudicate an employment grievance, except in specified situations, that are not applicable to this case. The jurisdiction of the court to adjudicate an employment grievance was discussed in Buksh v Bred Bank. Some of the*

[1] Prasad v Ministry of Education, Heritage and Arts [2024] FJHC 52; ERCC 27.2018 (29 January 2024)

[2] The Judge noted that the Respondents application to Strike Out included the submission that Government was an essential service and industry in terms of Section 185 of the Act. Although this was not an issue at the hearing we note the amendment of the definition of "essential service and industry" in the Employment Relations (Amendment) Act 2023. We were not advised as to whether Government has been designated as an essential service and industry following the date of commencement of that Act as is required by the Act.

matters raised by the applicant concern an employment grievance. These must be referred to mediation services under the Employment Relations Act"

and concluded:-

"10. The applicant has sought an order to renew his expired contract of employment. He has not shown any rights arising from his employment contract by which he is entitled to such renewal."

and ordered that the Notice of Motion be struck out.

[14] The Appellant appeals against the Decision on the following grounds:-

"(1) **That** the Learned Judge erred in law and/or in fact by holding that Section 220 of the Employment Act does not confer original jurisdiction on the court to adjudicate an employment grievance without giving due consideration to sections 220 (1) (h) & (3) and 230 (1) of the Employment Act and Regulation 16 of the Employment Relations (Administration) Regulations 2008.

(2) **That** the Learned Judge erred in law and/or in fact by not considering the past decisions of the Employment Court under the doctrine of *stare decisis* wherein it had been determined that the Employment Court has the jurisdiction to determine employment grievances.

(3) **That** the Learned Judge erred in law and/or in fact when he failed to give due consideration to annexure DH-01 of the Affidavit in Reply to the Affidavit in Response sworn by appellant on 1st May, 2019 which confirms that the renewal of employment contract is automatic for school-based staff provided there is no performance issues.

(4) **That** the Learned Judge erred in law and/or in fact by not giving any weight to the Civil Service (General) (Amendment) Regulations 2017 in particular Regulation 3 that amended Regulation 7 of the Civil Service Regulations, 1988 wherein the renewal of employment is subject to performance, therefore in the absence of any performance issue the employment of the Appellant ought to have been renewed.

(5) **That** the Learned Judge erred in Law and/or in fact by not considering that the appellant was treated unfairly and in breach of his contract when he was allowed to continue being employed after the contract had expired and later terminating the employment on the grounds of non-renewal on the findings of the investigation team that was not disclosed to the appellant.

(6) **That** the Learned Judge erred in law and/or in fact by denying the appellant the right to access the justice system under section 15 of the 2013 Constitution of Fiji when he struck out the employment action in its entirety."

[15] In the appeal before this Court the Respondent submitted as a preliminary objection that the appeal was incompetent as the Appellant had failed to obtain leave to appeal against the Decision. It is appropriate to deal with this issue before considering the Appellant's grounds of appeal.

Was the Appellant required to obtain leave to appeal to this Court

[16] Section 12(2) of the Court of Appeal Act 1949, as relevant to this case, provides:-

> "(2) No appeal shall lie –
> …
> (f) without leave of the Judge or of the Court of Appeal from any interlocutory order or interlocutory judgment made by or given by a Judge of the High Court…"

[17] Rule 26(3) of the Court of Appeal Rules 1949 provides:

> "(3) where under these Rules an application may be made either to the Court below or to the Court of Appeal it shall be made in the first instance to the Court below."

[18] The Appellant did not apply for leave either to the ERC or this Court. This issue raises the question whether the order striking out the Appellant's claim was an "interlocutory" order or judgment or a "final" order or judgment.

[19] Courts in Fiji had previously taken two different approaches to determining this issue. This Court in **Charan v Shah**[3] set out the two approaches known as the "order" approach and the "application" approach 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 would be finally determined whichever way the court decided the application."*

[20] The Supreme Court in **Jivaratnam v Prasad**[4] resolved this question when it held:

> *"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."*

[3] [1995] 41 FLR 65 at 67
[4] [2023] FJSC 11; CBV0005.2020 (28 April 2023)

[21] In the present case the Respondent filed the Strike Out application under Order 18 rule 18(1)(d) of the High Court Rules. It was therefore an interlocutory application.

[22] Counsel for the Respondent invited this Court to dismiss the appeal as incompetent for failure to obtain leave.

[23] The Appellant submitted on the other hand that the Judge had conclusively ruled that the Appellant had no contractual or legal right arising from his employment contract and the effect of the Decision had terminated the proceedings finally, thereby determining the substantive rights of the parties. The Decision therefore, it was submitted, was not an interlocutory order or judgment and leave was not required. This submission however sought to apply the "order approach" which as stated above is no longer applicable. We determined following **Jivaratnam v Prasad** (supra) that the Appellant required leave to appeal pursuant to Section 12(2)(f).

[24] In any event, no doubt noting the general rule of thumb stated in the above quoted passage from **Jivaratnam v Prasad** (supra) the Appellant applied orally at the commencement of the hearing of this appeal for an extension of time to apply for leave to appeal and for leave to appeal. The Respondent did not object to these applications.

[25] We considered that we should approach this issue as this Court did in the recent case of **Praveen v Mindpearl Ltd**[5] and that was to hear both the application for leave to appeal and the substantive appeal in the same hearing.

Did the Judge err in ordering that the Notice of Motion be struck out for want of prosecution

[26] The hearing of the appeal dealt primarily with Ground One of the Grounds of Appeal and in particular the Judge's finding that "Section 220 of the ERA does not confer original jurisdiction on the ERC to adjudicate an employment grievance except in specified situations that are not applicable to this case." This required a consideration of whether the Appellant's Notice of Motion and Affidavit in Support fell within the jurisdiction to hear and determine an action founded on an employment contract pursuant to Section 220 (1)(h) of the ERA which provides:-

[5] [2025] FJCA 170; ABU115.2023 (28 November 2025)

"220. — (1) The Employment Relations Court has jurisdiction—

> *(h) to hear and determine an action founded on an employment contract;"*

[27] This original jurisdiction of the ERC to hear and determine cases arising out of termination of employment pursuant to the terms of an employment contract has been considered in two recent Court of Appeal cases. Firstly in **ANZ Banking Group Pte Ltd v Sharma**[6] ("the ANZ case") which concerned an employee in an essential service and industry who had been dismissed, ANZ applied to strike out the action on the ground that the ERC did not have original jurisdiction. The Judge refused the application and held that the ERC had jurisdiction on the basis that the dismissal arose from his employment which was pursuant to an arrangement which amounted to a contract between the parties and therefore fell within Section 220(1)(h). ANZ appealed to this Court.

[28] The Court considered the question, whether a worker in Fiji, whether or not employed in an Essential Service and Industry could bring a claim of unjustified dismissal or unfair dismissal directly to the ERC (which has unlimited jurisdiction) or must those claims only be made in an employment grievance that can only be reported to Mediation Services and the Employment Relations Tribunal (which has jurisdiction not exceeding $40,000.00). The Court answered this question as follows:-

> *"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 Section 220(1)(h) to hear and determine such a claim.*[7]*"*

[29] Secondly in the more recent case of **Khan v Coca Cola Amatil (Fiji) Ltd**[8] ("the Khan case") which concerned a worker who had been summarily dismissed, this Court in considering the above statement in the ANZ case stated the following:-

> *"[28] However, whether it is 'properly pleaded' or not in any given action is very much in the eye of the beholder. In my view, if the requirement of 'properly pleaded' is to be insisted upon, it should not mean anything more than giving sufficient information in the*

---

[6] [2024] FJCA 29; ABU030.2022 (29 February 2024)
[7] At [64]
[8] [2025] FJCA 112; ABU0127.2023 (25 July 2025)

> *statement of claim which enables the employer to know what breaches of employment contract (express and implied) the employee complains about to found his action on his employment contract. Considering the appellant's pleadings, I am satisfied that the appellant's action is founded on the contract of employment and he has properly pleaded it as such. Nevertheless, it has to be admitted that the appellant's claim had a dual character of a breach of contract and an employment grievance. However, the additional pleadings on unfair and unlawful termination in the appellant's statement of claim would not persuade me to change my view. What is necessary according to* ***ANZ Banking*** *for the ERC to have jurisdiction is that as a matter of pleading and evidence, the contract should necessarily be central which is what the appellant's claim is about. Even if one disregards the second cause of action in the SC based on unfair and unlawful termination, there is still the first cause of action founded on the employment contract and pleaded as such. Thus, the second cause of action cannot in any way remove the jurisdiction of the ERC."*[9]

<u>Submissions</u>

[30] The Appellant submits that under Section 220 (1)(g) of the ERA the ERC has jurisdiction to hear and determine a question connected with an employment contract arising in the course of proceedings properly brought before it and that under Section 220 (1)(h) to hear and determine an employment action founded on an employment contract.

[31] Further Section 220 (3) provides that:

> *"In all matters before it, (the ERC) has full and exclusive jurisdiction to determine them in a manner and to make decisions or orders not inconsistent with the Act or any other written law or with the employment contract."*

[32] The above provisions it is submitted expressly provide for a broad conferral of exclusive original jurisdiction over matters emanating from or based upon employment contracts.

[33] The Appellant submits further that the Appellant's case concerns the Respondent's decision not to renew his employment contract following the outcome of a disciplinary investigation. The Appellant's action it is submitted is therefore based squarely on the employment contract and falls under Section 220 (1)(g)(h) and (i) of the ERA.

---

[9] At [28]

[34] The Appellant also submits that Section 230(1) of the ERA empowers the ERC upon determining that a worker has an employment grievance to order reinstatement, reimbursement of lost wages and compensation. The Appellant argues that the remedies referred to above are only available if the ERC has original jurisdiction over the grievance which is expressly provided for by Section 220(1)(h). These provisions it is submitted reinforce the proposition that that the ERC cannot decline jurisdiction where a grievance concerns contractual non-renewal presumed on alleged misconduct.

[35] The Appellant then refers to the passage from the Khan case quoted above and in particular to the view of the Court that the requirement of 'properly pleaded' in terms of the ANZ case:

> *"...should not mean anything more than giving sufficient information in the statement of claim which enables the employer to know the breaches of the employment contract (express and implied) the employee complains about to found his action on his employment contract."*

[36] It is submitted that the quoted authority supports the Appellant's position that his claim arises from and is based upon the employment contract and that accordingly the ERC had jurisdiction pursuant to Section 220 (1)(h) to (l).

[37] The Respondent on the other hand relied on the statement in the ANZ case above and submitted that it all boils down to the form and substance of the grievance application. With respect to "form" it submits that both the ANZ and Khan cases were instituted in the ERC by way of writs of summons with their claims particularised and pleaded in their statements of claim. In contrast the current case was instituted by way of a Notice of Motion and an Affidavit in Support.

[38] It is submitted that the form by which the claims were instituted in the ANZ and Khan cases is relevant as it impacts on the requirement for a claim to be properly pleaded in terms of the ANZ case. The Respondent submits this is not a mere technicality but a matter going to the competence and sustainability of the claim before the ERC.

[39] Further, instituting the employment grievance by way of a notice of motion in the current case has had the effect it is submitted of constraining the manner in which the claim may be pleaded and proven. Alternatively even if the form of instituting the grievance were acceptable it is submitted that the substance of the claim as stated in

the application is insufficient to satisfy the requirement that the claim must be properly pleaded.

[40] Finally it is submitted the Appellant has failed to indicate the terms of the employment contract which he claims was breached and gave rise to the employment grievance. He needed to do this in order for the claim to be within the jurisdiction of the ERC.

Discussion

[41] The Respondent in its submissions failed to address this Court's statement in the Khan case cited above relating to the requirement of "properly pleaded" and the view that it should not mean anything more than giving sufficient information to enable the employer to know what breaches of the employment contract the employee complains about to found his action on his employment contract. The Respondent only referred to the Khan case to support its submission on the form of the action that instituted the proceedings. We do not accept the Respondent's contention that the Appellant's claim lacks jurisdiction under Section 220 (1)(h) of the ERA because of the form by which the Appellant commenced proceedings.

[42] It may have been more appropriate for the Appellant to have commenced his action by way of a Writ of Summons with a Statement of Claim rather than by a Notice of Motion. We do not consider however that in the circumstances of this case his failure to do so should deny the Appellant the right to make a claim under Section 220 (1)(h) for lack of jurisdiction.

[43] We note that the ERA does not specify the form by which proceedings under Section 220 are to be brought to the ERC. We consider that the Appellant's Notice of Motion and Affidavit in Support gave sufficient information to enable the Respondent to identify the breaches of the employment contract (express and implied) the Appellant complains about to found his action on the employment contract in terms of the Khan case.

[44] We acknowledge that the Khan case had not been decided at the time the Decision was delivered however we must apply the law as it now stands.

[45] The parties filed written submissions in respect of the Respondent's application to strike out the proceedings and made oral submissions at the hearing of the Strike Out Application. In those submissions the Appellant argued strongly that the nature of the relief sought in the Appellant's claim was based on the non-renewal of his employment contract and as such was based on the employment contract and that the Court therefore had jurisdiction to consider the Appellant's claim under Section 220 (1) of the ERA. The Appellant's written submissions in this regard conclude that the Respondent's application to strike out is therefore ill-conceived and does not have merit and alleges that the application is orchestrated to deprive the Appellant of his "right to access the justice process and have his employment action determined by the Court."

[46] The Judge in the Decision does not address these submissions and simply finds that Section 220 "…does not confer original jurisdiction on the court to adjudicate an employment grievance except in specified situations that are not applicable to this case." The Judge does not give any reasons for reaching this conclusion and does not identify any "specified situations", or outline why such situations are "not applicable" to the present case. There are numerous authorities that support the proposition that it is trite law that if a court fails to give sufficient reasons for its decision it constitutes an error of law, (see for example **Zeait v Insurance Australia Limited t/a NRMA Insurance**[10].) The impugned decision is incompetent in this regard and for this reason alone should be set aside.

Conclusion

[47] For the reasons set out above we conclude that the Decision should be set aside and the action before the ERC reinstated and heard by another Judge. We expect that the decisions in the ANZ and Khan cases, which were delivered after the impugned Decision would be considered at such hearing. We also note for consideration Section 220 (3) and (4) of the ERA which provide:

> *"(3) In all matters before it, the Court has full and exclusive jurisdiction to determine them in a manner and to make decisions or orders not inconsistent with this Promulgation or any other written law or with the employment contract.*

[10] (2016) NSWSC 587

> (4) *No decision or order of the Court, and no proceedings before the Court, may be held to be invalid for want of form, or be void or in any way vitiated by reason of an informality or error in form.";*

and Order 9(1) of the High Court Rules which provides:-

> *"9.-(1) Where, in the case of a cause or matter begun by originating summons, it appears to the Court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause or matter had been begun by writ, it may order the proceedings to continue as if the cause or matter had been so begun and may, in particular, order that any affidavits shall stand as pleadings, with or without liberty to any of the parties to add thereto or to apply for particulars thereof."*

[48] Although Order 9(1) refers to a case or matter begun by originating summons we see no obstacle in principle to the Order also applying to a cause or matter begun by Notice of Motion.

Should the Appellant be given an extension of time for leave to appeal

[49] In **Praveen v Mindpearl Ltd** (supra) this Court stated following **Kumar v Prasad**[11] that:

> *"[53] An application for extension of time to appeal will require consideration of the reason for the failure to file within time, the length of the delay (and where there has been substantial delay, whether there is nonetheless a ground of appeal that will probably succeed), whether there is a ground of merit justifying the appellate court's consideration, and whether, if time is enlarged, the respondent will be unfairly prejudiced. These matters should be considered in the context of whether it would be just in all the circumstances to grant or refuse the application and the onus is on the appellant to show that in all the circumstances it would be just to grant the application"*

[50] As an explanation for not applying for leave the Appellant submitted that he did not apply for leave because of his (mistaken) understanding that because the proceedings were finally disposed of by the Decision he did not consider that leave was required.

[11] [2025] FJCA 159; ABU067.2024 (23 October 2025)

[51] The Supreme Court judgment in **Jivaratnam** that the application approach was to be followed was delivered on 28 April 2023. The ERC Decision in the present case was delivered on 29th January 2024 some eight months later. The Appellant should have been aware of the Supreme Court decision. Although the Respondent raised the preliminary leave issue in its written submissions it did not raise an objection to the oral application to extend the time to apply for leave at the hearing. It also did not submit that it was prejudiced by the delay. As is obvious from our conclusion on the jurisdiction issue we have concluded that the Appellant's appeal had a ground of merit.

[52] For the reasons stated above we consider that the Appellant should be given an extension of time for leave to appeal.

Should the Appellant be given Leave to Appeal

[53] This Court held in **Sea Pilots (Fiji) Ltd v Peckham**[12] in relation to an application for leave to appeal the following:-

> *"The applicant must demonstrate that the intended appeal has a realistic prospect of success. A 'real' prospect of success means that prospect of success must be realistic rather than fanciful and the Court considering a request for permission is not required to analyse whether the purported grounds of appeal will succeed but merely there is a real prospect of success."*

[54] Again obviously in view of our conclusion on the jurisdiction issue we need not consider whether the appeal had a real prospect of success save to conclude for the sake of formality that leave should be granted.

[12] [2025]; ABU055.2024 (17 February 2025) [7(c)]

Outcome:

[55] Having considered the parties submissions the Court has concluded that:-

(a) An extension of time should be granted to the Appellant for leave to appeal

(b) The Appellant should be given leave to appeal against the ERC decision

(c) The Appeal should be allowed

(d) The Appellant did not in his written submissions or at the hearing seek costs of this appeal. We do not consider in the circumstances of this matter that there should be any order as to costs.

Orders of the Court

1. *Time to apply for leave to appeal is extended and leave to appeal is granted.*

2. *The appeal is allowed and the Decision of the High Court delivered 29 January 2024 is set aside.*

3. *The Appellant's Notice of Motion dated 7th day of December 2018 is to be listed for hearing before another Judge.*

4. *There shall be no order as to costs*

Hon. Mr. Justice Alipate Qetaki
RESIDENT JUSTICE OF APPEAL

Hon. Mr. Justice Walton Morgan
JUSTICE OF APPEAL

Hon. Madam. Justice Pamela Andrews
JUSTICE OF APPEAL

Solicitors
Nilesh Sharma Lawyers for the Appellant
Office of the Attorney General for the Respondent