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

CIVIL APPEAL NO. ABU 030 OF 2022
[Lautoka Civil Action: ERCA 002 of 2017]

BETWEEN : **ANZ BANKING GROUP PTE LIMITED**

Appellant

AND : **AJENDRA SHARMA**

Respondent

Coram : **Jameel, JA**

: **Clark, JA**

: **Winter, JA**

Counsel : **Mr. J. Apted for the Appellant**

: **Ms. O. Solimailagi, Ms. A. Harikishan and Ms. S. Pratap for the Respondent**

Date of Hearing : **13 February 2024**

Date of Judgment : **29 February 2024**

JUDGMENT

Jameel, JA

1. I have had the benefit of reading the draft judgment of Clark, JA and I am in agreement with Her Ladyship's reasons, conclusions and proposed orders.

Clark, JA

Introduction

2. Mr Sharma, the respondent, had been in the employ of the appellant, the ANZ Banking Group for over 10 years when he was summarily dismissed. Mr Sharma lodged an employment grievance. He and his employer engaged in mediation. When the mediator failed to resolve the grievance the matter was referred to the Employment Relations Tribunal (the **Tribunal**). The Court Record shows that the matter was listed for several mentions over the course of the seven months the grievance was before the Tribunal. In its last direction, the Tribunal listed 5 December 2017 as the next mention date.

3. Mr Sharma, however, decided to pursue a different route. He discontinued his grievance in the Tribunal and filed instead an action in the Employment Relations Court (the **ERC**) seeking damages and other monetary relief.

4. ANZ applied to strike out Mr Sharma's action on conventional strike-out grounds.[1] At the hearing of the strike-out application ANZ's first argument was that the ERC had no jurisdiction to hear and determine Mr Sharma's action because the action was an employment grievance brought by an employee in an essential service and industry and the Employment Relations Act (the **ERA**) did not provide for employment grievances to be heard and determined by the ERC.

5. For the many and detailed reasons given in her Ruling on 14 August 2020, Her Hon Justice Anjala Wati refused to strike out Mr Sharma's action. In dismissing ANZ's application to strike out Her Honour concluded that while the Employment

[1] That is, under O.18, r 18(1) of the High Court Rules 1988:the statement of claim disclosed no reasonable cause of action, is scandalous, frivolous, or vexatious; may prejudice embarrass or delay the fair trial of the action; or is otherwise an abuse of the process of the court.

Relations Tribunal "…has jurisdiction to hear employment cases for claims up to $40,000 … [b]eyond that, the claims must be filed in the Employment Court".[2]

6. ANZ appeals the ERC's Ruling. The appeal raises an important jurisdictional point upon which there are conflicting decisions of the ERC. This Court is called upon to settle the law.

Questions of law raised by the appeal

7. Within its six primary grounds of appeal ANZ identifies some 14 errors of mixed fact and law. Mr Apted, counsel for ANZ, submitted there are two important questions of law for the determination of this Court:

> *(i) Under Part 19 and Parts 13 and 20 of the Employment Relations Act 2007, can a worker in an Essential Service and Industry bring an Action or employment grievance in the Employment Relations Court or is s/he restricted to reporting an employment grievance to Mediation Services which can only refer this to the Employment Relations Tribunal if the grievance is not settled in mediation?*
>
> *(ii) Can any worker in Fiji (whether or not employed in an Essential Service and Industry) bring a claim of unjustified dismissal or unfair dismissal directly to the Employment Relations Court (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).*

8. My approach in this judgment is to deal with the dispositive issues during the course of which, and where necessary, I will address the appellant's particulars of error on the part of the learned Judge in the ERC.

9. In the following section I analyse the relevant provisions of the ERA. Before engaging with the issues, and the parties' submissions, it is necessary to have a full understanding of the statutory regime governing employment grievances, particularly in relation to workers in essential services, and the jurisdictional boundaries within which the Tribunal and ERC are required to hear and determine the disputes before them.

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[2] *Ajendra Sharma v Australia and New Zealand Banking Group Ltd* ERCC 02 of 2017 at [45] (the **ERC Ruling**).

The statutory scheme

10. The first point about the ERA is one of nomenclature. By virtue of s 3 of the Interpretation Act 1967, where any Promulgation was in force on 31 July 2016 the word "Promulgation" may be replaced with the word "Act". Thus, the relevant statute in this case — the Employment Relations Promulgation 2007 — is properly referred to as the Employment Act 2007 (in this judgment, abbreviated to "ERA").

11. The ERA was amended in significant ways by the Employment Relations (Amendment) Act 2015. In this judgment, a reference to the ERA is a reference to the consolidated legislation, that is, the 2007 Act as amended by the 2015 Amendment Act.

12. Almost all of the ERA applies to workers and employees in essential services and industries but some Parts do not. With two exceptions, which I shall come to, Part 20 for example, is not to apply to essential services and industries. Part 20 of the ERA governs employment disputes, jurisdiction over trade disputes and employment grievances, and establishes institutions and procedures that (amongst other objectives) provide for the prompt resolution of differences in employment relationships.[3]

13. A construction of Part 19 and relevant provisions of the ERA begins with a brief discussion of the Essential National Industries (Employment) Decree 2011 (the "**Decree**"). The legislative backdrop throws light on the genesis for the exclusion of essential services and industries from Parts of the ERA and the legislative intention behind the 2015 Amendment Act.

The Essential National Industries (Employment) Decree 2011

14. The purpose of the Decree was to:[4]

> *ensure the viability and sustainability of certain industries that are vital or essential to the economy and the gross domestic product of Fiji.*

15. Section 4 stated three principles to which due regard was to be given in interpreting provisions of the Decree. The third principle was:[5]

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3 Employment Relations Act 2007, s 188(3).

4 Essential National Industries (Employment) Decree 2011, s 3.

> *the need to provide a means to resolve any disputes that may arise between workers and designated corporations.*

16. One of the Decree's several objectives was to:[6]

> *provide for the prompt and orderly settlement of all disputes including but not limited to those that may concern rates of pay, work rules, working conditions or disciplinary action.*

17. A "worker" meant any person employed by a corporation operating in an essential national industry. Essential services and industries were:[7]

    (i) those industries vital to the continued success of the Fiji national economy or those in which the Fiji Government had an essential interest; and

    (ii) those industries declared as essential national industries by the Minister under regulations made pursuant to the Decree.

18. Under Part 5 of the Decree, headed LIMITATIONS AND DISPUTE RESOLUTION:

    (i) It was the duty of all employers and workers governed by a collective agreement under the Decree to exert every reasonable effort to settle all disputes in order to avoid interruption to commerce or to the operation of any employer growing out of a dispute between the employer and workers.[8]

    (ii) There was to be *no recourse by any party to any court*, tribunal, or body exercising a judicial or quasi-judicial function.[9]

    (iii) The Decree had effect notwithstanding any provision of the ERA or any other law and to the extent that there was any inconsistency between the Decree and the ERA or any other law, the Decree was to prevail.[10]

    (iv) Except as provided by the Decree *the ERA would not apply to any essential national industry*, designated corporation *or any employee of a designated corporation or national industry*.[11]

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5 Section 4(c).
6 Section 5.
7 Section 2 – Interpretation.
8 Section 25.
9 Section 26(2).
10 Section 28(1).

(v) Any proceeding of any nature in any court or before any person exercising a judicial function instituted under the ERA against a designated corporation *would wholly terminate immediately upon commencement of [the] Decree* (if not already determined) and all preliminary or substantive orders made were to be wholly vacated.[12]

(vi) Where any proceeding of any nature was brought before any court or other adjudicating body in respect of any of the matters in subsection s 30(2), the presiding officer *without hearing or in any way determining the proceeding* was to immediately transfer the proceeding to the Employment Relations Tribunal for *termination of the proceeding*.[13]

The Employment Relations (Amendment) Act 2015

19. By 2015 the Government had recognised the need to amend the then existing employment laws and introduced the Employment Relations Promulgation (Amendment) Bill 2015. In his opening remarks in the Report of the Standing Committee on the Bill, the Chair stated:[14]

> *It will be an understatement to say that the services and industries are also essential for a nation since they form a major part of the economy. The general public and the nation as a whole rely on these sectors of the economy for their well-being and it is for this reason alone it becomes important to protect these sectors from crisis on any given day and even in extremely critical situations.*
>
> *Therefore it becomes important for any government to provide employment laws which not only protect its workers and allows them certain freedom, but are also consistent with international conventions which the country has ratified.* ***It also then becomes essential for a government to protect services and industries from crisis which inadvertently would harm the economy, the people and the very workers who rely on those for their daily bread.***
>
> *The Fijian government with that vision has sought to amend the existing employment laws of the country to bring them in line with*

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11 Section 28(2).
12 Section 30(2).
13 Section 30(3).
14 Standing Committee on Justice, Law and Human Rights, Report on the Employment Relations Promulgation (Amendment) Bills 2015, (Bill No 10 of 2015), p 4.

> *international best practice to suit its workers while maintaining the sanctity and affording protection to its essential national industries and services.*
> [Emphasis added.]

20. Whereas the effect of the 2011 Decree had been to limit remedies available to employees in essential services and industries, their position was restored to a significant extent by the amendments which the 2015 Amendment Act effected. Significantly, (for the purposes of this appeal) the 2015 Amendment Act:

    (i) repealed the 2011 Decree;

    (ii) notwithstanding the repeal of the Decree, preserved the essential services and industries listed in Sch 7 of the 2007 Promulgation and those essential services and industries declared under the Decree; and

    (iii) repealed and substituted Part 19.

The Employment Relations Act 2007

21. Part 19 applies to Essential Services and Industries. It begins with s 185, an interpretation section. Section 185 gives "employment grievance" a slightly different meaning than in s 4, the Interpretation section. In s 4 an 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…" then follows a list of potential grievances covering similar complaints to those covered in the s185 definition of employment grievance:

> ***S 185***
> ***employment grievance*** *means a grievance involving dispute of rights including the following matters—*
> *(a) dismissal or termination of any worker;*
> *(b) discrimination within the terms of Part 9;*
> *(c) duress in relation to membership or non-membership of a union;*
> *(d) sexual harassment in the workplace within the terms of section 76; or*
> *(e) worker's employment, or one or more conditions of it, is or are affected to the worker's disadvantage by some unjustifiable action by the employer,*
> *but shall not include any dispute or interest;*

22. The distinction between a s 4 and s 185 "worker" is significant. Whereas in s 4 a "worker" means a person employed under a contract of service, and includes an apprentice, learner, domestic worker, part-time worker or casual worker, under Part 19, s 185 defines a worker as one who is employed in an essential service and industry.

> ***worker*** *means a person who has entered into or works under a contract of service with an employer in an essential service and industry, and includes an officer or servant of—*
> *(a) the Government;*
> *(b) a statutory authority or entity;*
> *(c) a local authority, including a city council, town council or the Central Board of Health;*
> *(d) a company that is a public enterprise as defined in section 2 of the Public Enterprises Act 2019;*
> *(e) a duly authorised agent or manager of an employer; and*
> *(f) a person who owns, or is carrying on, or for the time being responsible for the management or control of a profession, business, trade or work in which a worker is engaged.*

23. Except as provided by subs (2) of s 187 all other Parts of the ERA shall not apply to essential services and industries. As ss 187 and 188 are central to the issues raised by this appeal they are set out in full (with emphases added):

> ***Application of other Parts***
>
> *187 (1) Notwithstanding anything contained in any other section of this Act, all other Parts of this Act shall not apply to essential services and industries, except to the extent provided in subsection (2)*
>
> *(2) To the extent that there is no inconsistency with this Part, Parts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 18, 21 and 22 shall apply to essential services and industries, provided however that—*
>
> *(a) if there is any inconsistency between those Parts and this Part, then this Part shall prevail and all procedures and matters prescribed in this Part shall prevail and over anything prescribed in those Parts; and*
>
> *(b) any reference in these Parts to the Employment Relations Tribunal or the Employment Relations Court shall mean the Arbitration Court established under this Part.*

Jurisdiction over trade disputes and employment grievances

188 (1) All trade disputes in essential services and industries shall be dealt with by the Arbitration Court in accordance with this Part.

(2) The Employment Relation Tribunal and the Employment Relations Court established under Part 20 shall not have any jurisdiction with respect to trade disputes in essential services and industries.

(3) For the avoidance of doubt, Part 20 shall not apply to essential services and industries, except as provided under subsection (4).

(4) Any employment grievance between a worker and an employer in essential services and industries that is not a trade dispute shall be dealt with in accordance with Parts 13 and 20, ***provided however that any such employment grievance must be lodged or filed within 21 days from the date when the employment grievance first arose****, and—*

(a) where such an employment grievance is lodged or filed by a worker in an essential service and industry, then that shall constitute an absolute bar to any claim, challenge or proceeding in any other court, tribunal or commission; and

(b) where a worker in an essential service and industry makes or lodges any claim, challenge or proceeding in any other court, tribunal or commission, then no employment grievance on the same matter can be lodged by that worker under this Act.

24. Section 188 has these significant features:

(i) Although s 187(2) excludes Part 13 [Employment Grievances] and Part 20 [Institutions] from applying to essential services and industries, those Parts are brought back into the picture via s 188(4). Section 188(4) states that an employment grievance between a worker and an employer in essential services and industries shall be dealt with in accordance with Parts 13 and 20. Part 13 provides grievance procedures by which workers may pursue

employment grievances either personally or through the assistance of a representative. For the purpose of Part 13 (and most other Parts of the ERA) a worker has the meaning given in s 4, the Interpretation section:

> ***worker*** *means a person who is employed under a contract of service, and includes an apprentice, learner, domestic worker, part-time worker or casual worker;*

(ii) The effect then of s 188(4) is to make the Part 13 grievance procedures provided for s 4 workers available also to essential service and industry workers. But there is a precondition. A claim by an essential service and industry worker must be lodged within 21 days from the date the employment grievance first arose.

(iii) Thus, where a s 4 worker has six months in which to submit an employment grievance to the employer,[15] a worker in essential services and industries — a s 185 worker — has only 21 days from the date the employment grievance first arose within which to lodge the claim.[16]

(iv) Where an employment grievance is lodged by an essential service and industry worker, that will constitute an "absolute bar" to any other claim, challenge or proceeding in any court, tribunal or commission. Equivalently, where any claim, challenge or proceeding is made or lodged in a court tribunal or commission, no employment grievance **on the same matter** can be lodged.[17]

25. Under s 110 an employment contract must contain agreed procedures for settling an employment grievance. The procedures must be consistent with the requirements of Part 13. If there are no agreed procedures, the procedures set out in Sch 4 are to apply.[18]

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15 ERA s 111(2).

16 Section 3 of the Employment Relations (Amendment) Act (Act 26 of 2023) substituted 21 days with 6 months. The amendment does not have retrospective effect.

17 ERA s 188(4)(a) and (b).

18 Section 110(1) and (2).

26. Again, at this point in the ERA, an "employment grievance" is one defined in s 4. Critically, by s 110(3) in Part 13:

> *All employment grievances must first be referred for mediation services set out in Division 1 of Part 20.*

Mediation Services

27. Division 1 of Part 20 requires a Mediation Unit to be established. A mediator is required to resolve the employment dispute or employment grievance "promptly and effectively". Where a dispute or grievance is resolved, the parties must sign and endorse a terms of settlement. The settlement is deemed to be a final and binding decision.

28. Except for enforcement purposes, no party can challenge the terms of settlement before the Tribunal, the ERC or any other court or tribunal.[19]

29. Broadly speaking then, a worker (whether or not in an essential service and industry) who has an employment grievance is bound by the ERA to take the following steps and pursue the following course:

(i) The worker must submit an employment grievance to the employer.

(ii) A worker in an essential service and industry must do so within 21 days from the date on which the action alleged occurred. Other workers have six months — or longer, if the employer consents to an extension. And failing consent, the Tribunal may extend the period and upon granting the application for extension may hear the grievance or refer it to Mediation Services.[20]

(iii) If mediation fails to resolve the employment grievance the mediator *shall* refer the grievance to the Tribunal.[21] Importantly, and as observed by His Honour Javed Mansoor in *Salim Buksh v Bred Bank (Fiji) Ltd*, the

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19 Section 196.

20 Section 111. Part 19, s 188(4) makes Part 13 containing ss 109-114, relevant to essential services and industries.

21 Section 194(4).

mediator has no discretion in the selection of the forum.[22] The grievance is to be referred to the Tribunal, not the ERC, nor any other body.

The Employment Relations Tribunal

30. The Tribunal is established under s 202 and has the wide jurisdiction given to it under s 211. It may adjudicate on a range of matters including employment grievances. Subsection (2) of s 211 limits the Tribunal's jurisdiction to claims up to $40,000. Members of the Tribunal who are not legally qualified, however, may only adjudicate on claims up to $10,000.

31. A party may apply to the Tribunal to have the proceedings transferred to the ERC for determination and the Tribunal may order transfer if it considers an important question of law is likely to arise or if the case is of such a nature and of such urgency that transfer is in the public interest.[23]

32. Finally in this overview of the legislation, I turn to the jurisdiction of the ERC.

Employment Relations Court

33. The ERC is constituted as a Division of the High Court, consisting of up to three Judges appointed under s 106(2) of the Constitution. Its jurisdiction is set out in s 220:

> *220.— (1) The Employment Relations Court has jurisdiction—*
>
> *(a) to hear and determine appeals conferred upon it under this Promulgation or any other written law;*
>
> *(b) to hear and determine offences against this Promulgation;*
>
> *(c) to hear and determine all actions for the recovery of penalties under this Promulgation;*
>
> *(d) to hear and determine questions of law referred to it by the Tribunal;*
>
> *(e) to hear and determine matters transferred to it under section 218(2);*
>
> *(f) to hear and determine applications for leave to have matters before the Tribunal transferred to it under section 218(3);*

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22 *Salim Buksh v Bred Bank (Fiji) Ltd* [2021] FJHC 259; ERCC02.2019 (27 August 2021).

23 Section 218.

(g) to hear and determine a question connected with an employment contract which arises in the course of proceedings properly brought before it;

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

(i) subject to subsection (2) and in proceedings founded on an employment contract to make any order that the Tribunal may make under any written law or the law relating to contracts;

(j) to hear and determine a question connected with the construction of this Promulgation or of any other law, being a question that arises in the course of proceedings properly brought before the Court, notwithstanding that the question concerns the meaning of the Promulgation under which the Court is constituted or under which it operates in a particular case;

(k) to order compliance with this Promulgation;

(l) to hear and determine an application for a discontinuance of an order in respect of an unlawful strike or lockout under this Promulgation;

(m) to hear and determine proceedings founded on tort relating to this Promulgation; or

(n) to exercise other functions and powers as are conferred on it by this or any other written law.

(2) In exercising its jurisdiction under subsection (1)(i) to make an order cancelling or varying an employment contract or a term of an employment contract, the Court must, notwithstanding anything in subsection (1)(h), make an order only if an order should be made and any other remedy would be inappropriate or inadequate.

(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.

(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.

34. Section 220 confers no jurisdiction on the ERC to hear and determine employment grievances whether as defined in s 4 or s 185 (relating to workers in an essential service industry). There are, however, three routes by which an employment grievance might find its way to the ERC:

(i) for the purpose of enforcing a settlement reached in mediation;[24]

(ii) on appeal: a party who is aggrieved by a decision of the Tribunal may appeal as of right to the ERC. Provided an appeal is made in the prescribed manner, an appeal lies as of right from any first instance decision of the Tribunal.[25]

(iii) by transfer: as previously mentioned, a proceeding may be transferred by order of the Tribunal or if a party seeks special leave from the ERC.[26] In either circumstance the transfer can only be ordered if "an important question of law is likely to arise" or if the case "is of such a nature and of such urgency that it is in the public interest that it be transferred".

35. I turn to this particular case.

Applying the statutory provisions to the proceedings in the ERC

36. The proceeding before the ERC was Mr Sharma's statement of claim pleading "unjustified dismissal" for which he claimed reimbursement equal to 18 years pay (until retirement), compensation for humiliation, loss of dignity and injury to feelings, damages/compensation for unjustified dismissal and other relief as the ERC deemed just. Mr Sharma pleaded the allegations against him that led to an investigation, suspension, a disciplinary meeting and summary dismissal. It is not necessary to rehearse the allegations leading to the dismissal as the issue in the ERC did not concern the merits of the dismissal but the ERC's jurisdiction to hear Mr Sharma's action. Similarly in this Court the issues for determination are jurisdictional issues in relation to which the facts leading to Mr Sharma's dismissal are irrelevant.

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24 Section 196(3).
25 Section 242.
26 Section 218

37. The learned Judge addressed four issues that she said arose from the application to strikeout.

First issue before the ERC

38. The first issue was whether the ERC had jurisdiction to hear an employment grievance involving a worker in an essential industry. Her Honour noted that the Tribunal and ERC were explicitly excluded by s 188(2) from hearing trade disputes. The learned Judge reasoned that if the ERC were not to have jurisdiction in relation to employment grievances by workers in essential services and industries, there would be a similar explicit provision.[27]

39. At first glance the point is attractive but it overlooks the fact that the ERC does indeed have jurisdiction in relation to employment grievances in the case of transfers and appeals. Once an employment grievance is before the ERC, whether by appeal or transfer, the ERC has full and exclusive jurisdiction to determine the matter and to make any decision or order that is not inconsistent with the ERA, any other written law or the employment contract.[28]

40. In this case Mr Sharma was an essential service and industry worker. The imperative language of s 188(4) therefore drove him to the employment grievance procedures set out in Part 13. Mr Sharma then engaged in mediation and engaged with the Tribunal as he was obliged to do by Parts 19, 13 and 20. Short of his employment grievance being transferred on the limited grounds prescribed, the ERC had no jurisdiction to hear and determine Mr Sharma's employment grievance.

41. Wati J also held that s 220(1)(h) of the ERA gave the ERC jurisdiction to hear Mr Sharma's employment grievance. Under s 220(1)(h) the ERC has jurisdiction to hear and determine an action founded on an employment contract. Her Honour reasoned that Mr Sharma had brought an action for unlawful and unfair dismissal; his dismissal arose from his employment; his employment was pursuant to some

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27 ERC Ruling at [13]-[14].
28 ERA s 220(3).

arrangement which amounted to the contract between the parties and as a result he fell within s 220(1)(h).[29]

42. Ms Solimailagi, counsel for Mr Sharma, submitted that "founded" in section 220 (1)(h), meant "based on a particular principle or concept – serves as a basis for". As a former worker of ANZ it would not be unreasonable to assume there was a contract of service and, as such, Mr Sharma's action came within s 220(1)(h) and the ERC's jurisdiction.

43. Mr Apted drew the distinction between an "action" and an "employment grievance". He submitted the clearest indication that "employment grievances" are different from "actions" and lie exclusively within the jurisdiction of the ERT is to be found in a comparison of ss 211 and 220. Section 211(1)(a) gives the Tribunal jurisdiction to "adjudicate on employment grievances." By contrast s 220 does not refer to employment grievances at all.

44. The question is whether an employment grievance may be brought under s 220(1)(h) which gives the ERC jurisdiction to "hear and determine an action founded on an employment contract."

45. The answer is "no". The ERC has no jurisdiction to entertain an employment grievance claim as such (unless transferred from the Tribunal or on appeal). The ERC does have jurisdiction to hear claims founded on contract where, as a matter of pleading and evidence, the contract will necessarily be central. Crucially, Mr Sharma's statement of claim before the ERC made no mention of a contract.

46. *Odger's Principles of Pleading and Practice* states[30]:

> *Where the action is brought on a contract, the contract must first be alleged, and then its breach. It should clearly appear whether the contract on which the plaintiff relies is express or implied, in the latter case the facts should be briefly stated from which the plaintiff contends a contract is to be implied. If the contract be by deed, it should be so stated; if it be not by deed, then a*

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29 ERC Ruling at [22].

30 D.B. Casson and I.H. Dennis *Odgers Principals of Pleading and Practice in Civil Actions in the High Court of Justice* (22ed, London, Stevens & Sons 1981) at 00161 and 163.

> *consideration should be shown, which must not be a past consideration.*
>
> *Wherever the contract sued on is contained in a written instrument, the pleader should shortly state what he conceives to be its legal effect; he should not set out the document itself verbatim unless the precise words of the document, or some of them, are material.*
> *…*
>
> ***The breach of contract, of which the plaintiff complains, must be alleged in the terms of the contract, or in words co-extensive with the effect or meaning of it.***
> [Emphasis added]

47. In *Salim Buksh v Bred Bank Fiji Ltd* Mansoor J heard and determined similar issues to those before Wati J. Having concluded that the plaintiff was not entitled to file an employment grievance in the ERC, His Honour turned to s 220(1)(h):[31]

> *The phrase, "action founded on an employment contract", can, therefore, be taken to include reference to a cause for dismissal based on breach of contract similar to the common law wrongful dismissal action. Where an action is founded on an employment contract the Court would have jurisdiction to determine a claim for damages for dismissal from employment. Such an action would attract the usual principles attendant on a damages claim including the principles of mitigation. An action founded on an employment contract can be heard and determined by the Court. Importantly, in proceedings founded on an employment contract, subject to section 220(2) of the Act 18, the Court has jurisdiction to make any order that the Tribunal may make under any written law or the law relating to contracts.*

48. I respectfully endorse His Honour's analysis and conclusions.

Second issue before the ERC

49. The second issue before Her Honour Wati J was whether Mr Sharma, an essential service and industry worker, had filed his employment grievance within the 21-day timeframe required by s 188(4).

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[31] PTO at [30]

50. It is not in dispute that Mr Sharma reported his employment grievance within 21 days. The issue arises because ANZ has submitted that if the ERC had jurisdiction over employment grievances in essential services and industries then s 188(4) required the grievance to be lodged or filed within 21 days and Mr Sharma was out of time.

51. ANZ advances this is an alternative argument based on the ERC having jurisdiction over employment grievances in essential services and industries (which ANZ denies). Because I have concluded for the reasons set out that there is no such jurisdiction in the ERC, it is not necessary to engage with the point further except to make this observation. The 21-day timeframe was a pre-requisite for initiating an employment grievance by an essential service and industry worker. That initiation cannot be in the ERC. Therefore, the requirement cannot relate to the filing of documents in the ERC. If the ERC became seized of an employment grievance matter (by way of transfer, say) then the question of compliance with the timeframe might arise for that Court.

Third issue before the ERC

52. Mr Sharma formally discontinued his employment grievance before the Tribunal and filed an action in the ERC. The question arises, therefore, as to whether the filing of his claim in the ERC constituted contravention of s 188(4)(a) under which the lodging of an employment grievance by a worker in an essential service and industry shall "constitute an absolute bar to any claim, challenge, or proceeding in any other court, tribunal or commission".

53. Having carefully examined the provisions Her Honour concluded:[32]

> *Section 188(4)(b) … means that the worker can choose to either vindicate his grievance under the ERA or under some other law. Any person making a claim under the ERA has no rights to vindicate his claim under any other law.*
>
> *It is proper to avoid duplicity of claims as two claims for infringement of one particular right may amount to an abuse of the process of the court. However, I do not see any prejudice if like in this case, the employee has withdrawn his case because he realised that his claim*

[32] ERC Ruling at [31]-[30].

> *was beyond the jurisdiction of the Tribunal and then files a fresh claim in the Employment Court.*

54. Mr. Apted submitted that:

> *The intention of [s 188(4)(a)] was to ensure early finality in employment claims in essential services and industries, by limiting the claims under the ERA to employment grievances that can only be brought within 21 days, and barring a second bite at the cherry once an employment grievance or other claim is lodged.*

55. The submission is well made. A statutory curtailment of multiple proceedings on the same matter is typically for the purpose of preventing an abuse of the court process. But it is apparent s 188(4) has another focus. While the 2011 Decree might have been repealed, essential services and industries remain and those who work with an employer in an essential service and industry have a special recognition in the ERA. They are defined differently from other workers. Parts of the ERA are expressed not to apply to them and a carefully prescribed employment grievance regime applies to such workers. A degree of expedition attends an employment grievance process initiated by an essential service and industry worker. These features of Part 19 appear to reflect the desire of the Legislature when the Bill was introduced to not only amend the employment laws of Fiji to bring them in line with international best practice but to do so while protecting its essential national industries and services.

56. Where the Decree disallowed workers in essential services and industries from joining a trade union, the 2015 Amendment Act returned to these workers the right to organise, the right to join a trade union and the right to collectively bargain. The lack of equivalence between essential service and industry workers which is created by ss 187 and 188, in particular the "absolute bar" created by s 188(4) may be seen as reflecting Parliament's concern that essential service and industry employers not be diverted from their focus by protracted and burdensome litigation in relation to employment grievances. Employment laws were amended in 2015 not only to protect workers but also to maintain the "sanctity of and afford protection to Fiji's essential national industries and services".[33] As the Hon A Sayed-Khaiyum stated

[33] Standing Committee on Justice, Law and Human Rights, Report on the Employment Relations Promulgation (Amendment) Bills 2015, (Bill No 10 of 2015), p 4.

during the debate following his motion that Parliament approve the 2015 Amendment Bill for assent by the President:[34]

> *Fiji is a developing country. There are certain issues we need to take into consideration. We need to be able to look to the future. … There are certain industries that may not be essential in other countries that are essential for us.*

57. Accordingly, having lodged an employment grievance within the 21-day period the essential service and industry worker is unable to delay resolution of the grievance by seeking relief in other forums: s 188(4)(a). Similarly, where an essential service and industry worker makes or lodges any claim in any "other court" no employment grievance on the same matter can be lodged by that worker under the ERA: s 188(4)(b).

Fourth issue before the ERC

58. The final issue for Her Honour's determination was whether the ERC has jurisdiction to hear unlawful or unjustified or unfair dismissal claims, or whether they were first required to be reported to the Mediation Service.

59. The learned Judge concluded that the Tribunal had jurisdiction to hear employment cases involving claims up to $40,000 but beyond that amount claims must be filed in the ERC.[35] Her Honour took as an example a person being paid a salary of $250,000 per annum. If making a claim for unjustified dismissal and claiming loss of salary the Tribunal would have no jurisdiction. Her Honour asked rhetorically: "Why should he be forced to accept anything up to $40,000 when the legislature has not fixed a maximum ceiling for the claims for employment grievances?" Not only is the ERC able to hear actions founded on an employment contract but under s 230(b) the ERC and Tribunal have power to reimburse to a worker a sum equal to the whole or any part of wages or other money lost by the worker as a result of the grievance. Her Honour did "not find it legally permissible to go past … s 230 and

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34 Hon A Sayed-Khalyum Attorney-General and Minister for Finance, Service and Communications following his motion that the Employment Relations (Amendment) Bill 2015 (No 10/2015) be approved for assent by the President: 8 July 2015, Hansard p 1512.

35 ERC Ruling, at [44].

set a ceiling for damages in all employment grievance cases. That would result in absurdity and the provisions of s 230 unworkable".[36]

60. Although seeking to uphold the decision of the ERC, the respondent did not specifically address the issue of what I shall term the "statutory cap" on claims for employment grievances. The appellant emphasised the clear intention of the Legislature to confer an original jurisdiction to hear and determine employment grievances only upon the Tribunal.

61. When construing an enactment the courts must attempt to give effect to its plain meaning having regard to the words used — the text — in the context of the enactment as a whole. Her Honour's concern about the statutory limitation on awards for employment grievances was perhaps a recognition of the "difficulties in attaining corrective justice when statutory limits are placed on awards of compensation".[37] However, Her Honour's approach had the effect of treating the ERA as prescribing "a floor and not a ceiling", as Lord Steyn put it in *Eastwood v Magnox & McCabe v Cornwall County Council,* a decision of the House of Lords to which Mr Apted drew the Court's attention.[38]

> *12 … In the statutory code Parliament has addressed the highly sensitive and controversial issue of what compensation should be paid to employees who are dismissed unfairly. This code is now an established and central part of this country's employment law. The code has limited the amount payable as compensation. In 1971 the limit was £4,160. Reflecting inflation, this limit was raised periodically up to £12,000 in 1998. In the following year the statutory maximum was raised in one bound to £50,000. From there it has risen to the present figure of £55,000.*
>
> *13* ***In fixing these limits on the amount of compensatory awards Parliament has expressed its view on how the interests of employers and employees, and the social and economic interests of the country as a whole, are best balanced in cases of unfair dismissal. It is not for***

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36 ERC Ruling at [35]-39].

37 To use Mansoor J's description in *Salim Buksh v Bred Bank (Fiji) Ltd,* at [23].

38 *Eastwood v Magnox & McCabe v Cornwall County Council* [2004] 3 WLR 322, [2004] UKHL 35 at [13].

> ***the courts to extend further a common law implied term when this would depart significantly from the balance set by the legislature. To treat the statutory code as prescribing a floor and not a ceiling would do just that.*** *A common law action for breach of an implied term not to be dismissed unfairly would be inconsistent with the purpose Parliament sought to achieve by imposing limits on the amount of compensatory awards payable in respect of unfair dismissal. It would also be inconsistent with the statutory exclusion of the statutory right where an employee had not been employed for a qualifying period or had reached normal retiring age or the age of 65 and further, with the parliamentary intention that questions of unfair dismissal should be dealt with by specialised tribunals and not the ordinary courts of law.* [Emphasis added].

62. There are conflicting decisions of the ERC on the question whether it has jurisdiction to hear and determine employment grievances. Notwithstanding that the statutory cap may pose difficulties for the plaintiffs whose claims are for significantly more than $40,000, I agree with respect, with the observation of Mansoor J that:[39]

> *…the Tribunal's jurisdictional limit alone is not a sufficient ground for the Court to assume jurisdiction when Parliament has not expressly given the Court the right to hear an employment grievance.*

Conclusion

63. The dispositive issues having been addressed and answered it is not necessary to examine the many particulars of error included in the appellant's grounds of appeal.

64. The two questions of law are set out once more, and answered as follows:

> *(i) Under Part 19 and Parts 13 and 20 of the Employment Relations Act 2007, can a worker in an Essential Service and Industry bring an Action or employment grievance in the Employment Relations Court or is s/he restricted to reporting an employment grievance to Mediation Services which can only refer this to the Employment Relations Tribunal if the grievance is not settled in mediation?*

[39] *Salim Buksh v Bred Bank (Fiji) Ltd,* above n, at [22].

Answer: The Employment Relations Court has no jurisdiction to hear and determine an employment grievance brought by a worker in an essential service and industry[40]. Such a worker is bound to pursue their employment grievance first, by lodging it in accordance with s 188(4) and secondly, in accordance with Part 13 pursuant to which the employment grievance will "first be referred for mediation services…"

(ii) Can any worker in Fiji (whether or not employed in an Essential Service and Industry) bring a claim of unjustified dismissal or unfair dismissal directly to the Employment Relations Court (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).

Answer: The ERC has no jurisdiction to hear employment grievances but if a claim for unjustified or unfair dismissal is "founded on a contract of employment", and properly pleaded as such, the ERC has jurisdiction under s 220(1)(h) to hear and determine such a claim.

Result

65. The appellant has succeeded in its appeal.

66. In the normal course, costs would follow the event. In this case, however, the respondent has had the misfortune of finding that the forum which he believed could hear and determine his employment grievance has no jurisdiction to do so. His understanding and belief was reasonable. The ERC itself considered it had jurisdiction to entertain the respondent's claim.

67. In the circumstances it is appropriate that costs lie where they fall.

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40 With the exceptions set out above at paragraph 34.

Winter, JA

68. I agree with the judgment of Clark, JA.

Orders

(i) The appeal is allowed.

(ii) The Ruling and orders of the ERC are set aside.

(iii) The parties will bear their own costs.

Hon. Madam. Justice Farzana Jameel
JUSTICE OF APPEAL

COURT OF APPEAL
FIJI

Hon. Madam Justice Karen Clark
JUSTICE OF APPEAL

Hon. Mr. Justice Gerard Winter
JUSTICE OF APPEAL