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

CIVIL APPEAL NO. ABU45/2021
Employment Relations Court Appeal No. ECRA32 of 2018

BETWEEN : **SHARON PRASHIKA WATI**

Appellant

AND : **FIJI ELECTIONS OFFICE**

Respondent

Coram : Jitoko, P
Andrews, JA
Winter, JA

Counsel : Mr D Nair for the Appellant
Ms O Solimailagi, Mr V Ram, and Ms A Harikishan for the Respondent

Date of Hearing : 9 February 2024

Date of Judgment : 29 February 2024

JUDGMENT

Jitoko, P

[1] I have had the advantage of reading in draft the judgment of the Hon. Andrews JA. I totally agree with her and for the reasons which she gave. I too would dismiss the appeal.

Andrews, JA

[2] The appellant has appealed against the judgment of Madam Justice Anjala Wati, given in the Employment Relations Court at Suva on 23 March 2021.[1] In that judgment, the Judge dismissed the appellant's appeal against the Ruling of the Employment Relations Tribunal dated 23 November 2018, striking out the appellant's grievance against the respondent.

[3] The central issue on appeal is whether the respondent, the Fiji Elections Office ("the FEO") is an "essential service and industry" ("ESI") as defined in s 185 of the Employment Relations Act 2007 ("the ERA"), and therefore subject to the provisions as to employment grievances set out in Part 19 of the Act.

Background facts and procedural history

[4] The appellant was employed by the FEO for a three-year term pursuant to an employment agreement dated 5 September 2016. Her employment was terminated with immediate effect by way of a letter dated 26 May 2017. The letter did not set out any reasons for the termination, but advised that the termination was pursuant to cl 2.2 of the agreement, which provided:

> ***2 Term***
>
> *2.1* ...
>
> *2.2 Either party may terminate the employment and this Agreement by giving one (1) months written notice to the other or by payment of one (1) months salary in lieu of notice.*

[1] *Wati v Fiji Elections Office* [2021] FJHC 182; ERCA32.2018 (23 March 2021).

[5] The appellant wrote to the Chairman of the Electoral Commission and the Director of Corporate Services of the FEO on 7 June 2017 seeking their intervention, and subsequently attended a meeting with the Electoral Commission on 16 June 2017, to speak as to her grievance. She received a letter from the Electoral Commission on 20 July 2017 which advised that the termination was pursuant to a clause in her employment contract, and that the requirements of the contract had been completed.

[6] The appellant completed an "ER Form 1" notice of grievance which was dated 3 June 2017, but date stamped as received by the Mediations Unit on 3 July 2017. Mediation did not resolve the grievance and it was referred to the Employment Relations Tribunal ("the Tribunal") on 21 August 2017.

[7] The FEO applied to the Tribunal to strike out the appellant's grievance, on the grounds that it was time barred under s 188(4) of the ERA. The Tribunal held that the grievance was time barred and could not be heard by the Tribunal. The appellant appealed to the Employment Relations Court ("the Employment Court") and, as recorded earlier, her appeal was dismissed.

Relevant statutory provisions

[8] The judgments of the Tribunal and the Employment Court, and Counsel in their submissions in this Court, referred to provisions of the Constitution, the Electoral Act, and the ERA. At the relevant time, these provided:

> *Constitution*
>
> ***75*** *(1) The Electoral Commission established under the State Services Decree 2009 continues in existence*
>
> ***76*** *(1) The office of the Supervisor of Elections established under the State Services Decree 2009 continues in existence.*
>
> *Electoral Act*
>
> ***2 Interpretation***
>
> ...

Fijian Elections Office *means the office of the Supervisor which is responsible for the conduct of elections in accordance with the Constitution and this Act*

...

Supervisor *means the Supervisor of Elections appointed under section 76 of the Constitution;*

6 Duties and powers of Supervisor

(1) The Supervisor, as head of the Fijian Elections Office -
(a) administers the registration and regulates the conduct, funding and disclosures of political parties;
(b) administers the registration of voters and maintains the Register of Voters;
(c) administers the registration of candidates;
(d) implements voter information and education initiatives;
(e) conducts election of members of Parliament and such other elections as prescribed under section 154, including the conduct of voting, counting and tabulation of election results;
(f) oversees compliance with campaign rules and reporting requirements; and
(g) performs any other function as conferred by this Act or any other written law.

(2) The Supervisor shall have the authority to appoint, remove and take disciplinary action against any employee of the Fijian Elections Office, and shall have the authority to determine all matters pertaining to the employment of all staff in the Fijian Elections Office, including the—
(a) terms and conditions of employment;
(b) qualification requirements for appointment and the process to be followed for appointment, which must be an open, transparent and competitive selection process based on merit;
(c) salaries, benefits and allowances payable in accordance with the budget of the Fijian Elections Office; and
(d) total establishment or the total number of staff that are required to be appointed, in accordance with the budget of the Fijian Elections Office.

(3) In making appointments of any person to the Fijian Elections Office, the Supervisor must ensure that the independence, impartiality and integrity of the Fijian Elections Office is upheld and maintained.

(4) In exercising his or her powers to remove or to take disciplinary action against any employee of the Fijian Elections Office, the Supervisor must ensure that the process followed in the exercise of his or her powers is transparent and is in accordance with the Standing Orders which must be publicly available.

(5) The Supervisor will serve as the returning officer.

7 Exercise of powers of Supervisor

(1) The Supervisor must conduct his or her duties and exercise his or her powers in an impartial manner and in accordance with the law.

(2) Except as provided in this Act, the Supervisor may delegate any or all of his or her functions to other election officials, and may issue to election officials such instructions in writing as he or she from time to time considers necessary to ensure the effective performance of his or her functions.

(3) In the course of performing his or her functions, the Supervisor may correct any error, omission or duplication on any application, the Register of Voters, the Register of Postal Voters, voter lists or any other document made or issued under this Act which appears to have been made inadvertently.

8 Independence of Supervisor

8 *In the performance of his or her functions and the exercise of his or her powers, the Supervisor is not subject to the direction or control by any person, except that he or she must comply with—*
(a) the directions or instructions that the Electoral Commission gives him or her concerning the performance of his or her functions; and
(b) a decision of a court of law exercising its jurisdiction in relation to a question on whether he or she has performed the functions or exercised the powers in accordance with the Constitution and the law, or whether he or she should or should not perform those functions or exercise those powers.

9 Fijian Elections Office

9 *The Fijian Elections Office shall be an independent office which must be properly staffed and equipped to perform its duties and functions in accordance with the Constitution and this Act, with such organisational structure, key positions and authorities, as approved by the Supervisor.*

Employment Relations Act

Part 19

185 Interpretation

essential service and industry *or* ***essential services and industries*** *means a service listed in Schedule 7 and includes those essential national industries declared and designated corporations or designated companies designated under the Decree, and for the avoidance of doubt, shall also include—*

(a) the Government;
(b) a statutory authority;
(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.

187 Application of other Parts

(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 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.

188 Jurisdiction over trade disputes and employment grievances

(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 Relations 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 employee 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 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.

Part 20

234 Validation of informal proceedings etc

(1) If anything which is required or authorised to be done by this Act is not done within the required time limit, or is done informally, the court or the tribunal may, if the matter is within its jurisdiction, on the application of a person interested, order—

(a) the extension of time within which the thing may be done; or
(b) the validation of the thing informally done.

(2) The power under subsection (1) does not include the power to make an order in respect of judicial proceedings already instituted in another court of law, other than the court.

The Employment Court judgment

[9] The Judge held that the Tribunal was correct to find that the appellant's claim was time barred. The Judge found that s 188(4) of the ERA requires a grievance between a worker and an employer in an ESI to be lodged or filed within 21 days from the date that grievance first arose, and the issue to be determined was "whether the FEO is an essential service and industry", which required determination of whether the FEO is a "statutory body". The Judge referred to the definition of an ESI in s 185 of the ERA, and held that it "is plain and clear that the FEO is a statutory body and thus an essential service and industry".[2]

[10] The Judge recorded that there was no dispute that the appellant's grievance had not been filed within the 21 day period after it arose, and that there "is no provision in law which allows for extension of time for filing grievances out of time when in concerns an employee in an essential service or industry".[3]

Grounds of appeal to this Court

[11] The appellant's grounds of appeal may be summarised as being that the Judge erred in:

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2 Employment Court judgment, at paragraphs 6 and 7.
3 Employment Court judgment, at paragraph 8. (The Judge referred to the FEO as a "statutory body" rather than a "statutory authority", but there was no issue as to there being any distinction between the two terms.)

(1) holding that the FEO is a statutory authority under s 9 of the Electoral Act 2014 ("the Electoral Act"), and not considering that:

(a) s 9 of the Electoral Act explicitly states that the FEO is an independent office;

(b) s 2 of the Electoral Act defines the FEO as the office of the Supervisor of Elections ("the SOE"), which is independent under s 8 of the Electoral Act; and

(c) the Electoral Act did not create or legislate the FEO to be a body corporate;

(2) not holding that under the doctrine of separation of powers the Executive Authority cannot exercise authority or control over the FEO, with the result that the FEO is not a statutory authority;

(3) holding that the FEO is an one of the "essential services and industries", contrary to the rationale of the Essential National Industries (Employment) Decree 2011 and its subsequent amendments;

(4) holding that there is no provision allowing for extension of time to file a grievance when:

(a) s 234(1) of the ERA allows for an extension of time;

(b) the application of s 234(1) is provided for under s 188(4) of the ERA; and

(c) s 15 of the Constitution of the Republic of Fiji ("the Constitution") gives access to the justice system, that should not

be denied in the absence of any specific impediments where discretion of the court is denied or curtailed; and

(5) such other grounds of appeal as may be added upon receipt of the record and Judge's notes.[4]

Was the Judge wrong to hold that the FEO is a statutory authority and therefore an ESI?

Submissions

[12] In respect of grounds (1) and (2), Mr Nair submitted for the appellant that the Judge failed to consider that pursuant to ss 2 and 9 of the Electoral Act, the FEO is an independent institution, and is the office of the SOE who conducts elections in accordance with the Constitution and the Act. He submitted that the FEO is a constitutional office, not a statutory authority. He further submitted that having correctly noted that the FEO is an independent office established under s 9 of the Electoral Act, the Judge failed to elaborate further on its independence and the need to uphold that FEO's independence in order to maintain the principles of the separation of powers.

[13] Mr Nair invited this Court to consider the interpretation of "statutory authority" in s 2(1) of the Financial Management Act 2004 and submitted that statutory authorities are administered by the Minister responsible, whereas the Minister for Elections cannot intervene in the functions of the FEO or the SOE. He submitted that as, such, the FEO is not one of the "statutory authorities" but an institution established under the Constitution.

[14] Mr Nair also put it that the FEO is not a statutory authority because it is not "under the control of the Government", and that such control is present in statutory authorities. He did not refer to any provision in the ERA or the Electoral Act that supported that

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[4] No further grounds of appeal have been filed.

contention, but referred to the provisions of the Essential National Industries (Employment) Decree 2011 ("the ENI Decree"), which was the focus of his third ground of appeal.

[15] Ms Solimailagi submitted for the respondent that the Judge was correct to find that the FEO is a statutory authority, and therefore within the definition of ESI in s 185 of the ERA. She referred to the judgment of the Employment Relations Court in *Construction, Energy and Timber Workers Union of Fiji v Fiji Electricity Authority* and submitted that the term "statutory authority" is to be given a broad and literal interpretation as "an authority established under a statute".[5]

[16] Ms Solimailagi submitted that the FEO was established, and its functions and responsibilities set out, under s 9 of the Electoral Act. The office of the SOE was established under the State Services Decree 2009, and continues in existence under s 76 (1) of the Constitution. She further submitted that the Constitution was promulgated as a Schedule to the Constitution of the Republic of Fiji (Promulgation) Act 2013, and s 2(4) provides that the Schedule is to be construed and have effect as part of the Act. The effect of this is, she submitted, that the Constitution is itself a statute.

[17] She submitted that s 185 of the ERA defined ESIs in three categories: first, services listed in Schedule 7 of the ERA, secondly, essential national industries, corporations and companies designated under "the Decree" (defined in s 185 as "the Essential National Industries (Employment) Decree 2011") and, thirdly, those listed in s 185(a) to (f) of the ERA. She submitted that the appellant misconstrued s 185 by seeking to have it interpreted as including as ESIs only those in the first two categories. She submitted that s 185 cannot be limited to those two categories, and must be given its literal interpretation. She referred to the expression of the "literal" approach to statutory interpretation set out

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5 *Construction, Energy and Timber Workers Union of Fiji v Fiji Electricity Authority* [2011] FJHC 821: ERCA11.2011 (24 August 2011).

in the judgment of Higgins J in the High Court of Australia in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd*:[6]

> *The fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded according to the intent of the Parliament that made it; and that intention has to be found by an examination of the language used in the statute as a whole. The question is, what does the language mean; and when we find what the language means, in its ordinary and natural sense, it is our duty to obey that meaning, even if we think the result to be inconvenient or impolitic or improbable.*

[18] Ms Solimailagi further submitted that the fact that both the FEO and the SOE are independent offices does not negate that fact that the FEO is a statutory authority; that is an authority created by statute. She also submitted that by reference to the provisions of ss 6-9 of the Electoral Act, the SOE can be regarded as being, in effect, the same entity as the FEO and, as such, a statutory authority.

Discussion

[19] Section 185 of the ERA must be given its literal interpretation on the natural and ordinary meaning of its wording.

[20] I do not accept Mr Nair's submission that the FEO is a "constitutional" authority, but not a "statutory authority" under s 185. I accept Ms Solimailagi's submission that the FEO was created by statute (s 9 of the Electoral Act) and I also accept her submission that s 185 defines the term "essential service and industry" as comprising three categories: those listed in Schedule 7 to the ERA, those designated in the ENI Decree, and those listed in s 185(a)-(f) of the ERA. That is the natural and ordinary meaning of the words in s 185

[21] Mr Nair did not point this Court to any provision in the Electoral Act (or elsewhere) which introduces a requirement that an entity be "under the control" of a Minister, rather than independent, in order to be considered a statutory authority and I see no grounds on which

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[6] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) CLR 129, at 161-2 (HCA).

such a gloss should be put on the interpretation of s 185 to that effect. I am not persuaded that the fact that the Electoral Act declares both the FEO and the SEO to be independent should have the effect of rendering them not "statutory authorities" pursuant to s 185.

[22] I have concluded, therefore, that the appellant's employer, the FEO, is a statutory authority and, as such, an ESI as defined in s 185 of the ERA. I am not persuaded that the Judge erred in making those findings. I have concluded that first and second grounds of appeal cannot succeed.

The Essential National Industries (Employment) Decree 2011

Submissions

[23] The third ground of the appellant's appeal was that the Judge's finding that the FEO is an ESI was contrary to the rationale of the ENI Decree. He submitted that the promulgation of the ENI Decree led to there being two sets of employment legislation: one for essential industries and one for non-essential industries. He submitted that the Employment Court and the Tribunal have interpreted s 185 as including all Government agencies as "essential services and industries", and that this interpretation is most unreasonable, as it basically includes all employment sectors in Fiji as ESIs. He submitted that to interpret s 185, the proper course is to determine the intention of Parliament in promulgating the ENI Decree, by examining its rationale, as set out in s 3:

> *3 The purpose of this Decree is to ensure the viability and sustainability of certain industries that are vital or essential to the economy and gross domestic product of Fiji.*

[24] Mr Nair submitted that the FEO is not an organisation that can be defined as "vital or essential to the economy and gross domestic product of Fiji", but is an independent constitutional office responsible for the conduct of elections. He submitted that given the FEO's constitutional functions it would be absurd to say that it comes within the interpretation of an "essential and service industry". He submitted that the rationale for

the ENI decree is also evident from s 4 (which sets out principles to be considered in interpreting the provisions of the ENI decree) and s 5 (which sets out its objectives).

[25] Mr Nair also referred to the services listed in Schedule 7 of the ERA (which could broadly be described as public services, generally of an infrastructure or welfare nature, such as fire and emergency, health services, telecommunications and transport). He submitted that the FEO was not listed in the original Schedule 7 list, and has not been added subsequently. He submitted that Parliament's intention was "definitely" not to include all employment sectors and businesses as ESIs, but to protect certain employment sectors from strike action that are vital for the economy of Fiji. He submitted that the FEO is not vital to the Fiji economy, but is an independent institution required under the Constitution to conduct fair and transparent elections.

[26] Ms Solimailagi submitted that the ENI Decree is not relevant for the purpose of determining whether the FEO is an ESI under the ERA. She submitted that the definition of ESIs in the ERA is broader than the definition set out in the ENI Decree, so is not limited to those declared and designated under the Decree. She submitted that while the s 185 ERA saved the declarations and designations of the ENI, it expanded the scope of ESIs to include (amongst other entities) the Government and statutory authorities.

[27] Ms Solimailagi further submitted that workers in ESIs have not been denied their right to redress under the ERA, and that Parliament's underlying intention of regulating essential services and industries, including imposing a stringent time requirement for filing an employment grievance, was for the overall interest of the Fijian economy and Fijian citizens.

Discussion

[28] I am not persuaded that the provisions of the ENI Decree determine the interpretation of the provisions of s 185 of the ERA, as submitted for the appellant. As I concluded in respect of the appellant's first two grounds of appeal, the definition of ESI comprises three distinct categories, of which the list in s 185(a) to (f) is the third category. Had it

been Parliament's intention to confine the definition of ESIs to the definition set out in the ENI Decree, there would have been no need to include the third category.

[29] It should also be noted that Part 19 of the ERA (which includes s 185) was inserted into the ERA in 2015, pursuant to the Employment Relations (Amendment) Act 2015 (Act No. 4 of 2015). The ENI Decree was promulgated in 2011, and Parliament had the opportunity to consider the Decree in relation to the drafting of s 185. Parliament chose to enact s 185 as it did. There are no grounds on which Parliament's intention could be construed in the manner sought by the appellant. I have concluded that the appellant's third ground of appeal cannot succeed.

Did the Judge err in holding that there is no provision that allowed for an extension of time to file a grievance?

[30] The appellant's fourth ground of appeal requires this Court to consider the application of ss 187, 188 and 234(1) of the ERA. I repeat these provisions, for ease of reference:

> ***Part 19***
>
> ***187 Application of other Parts***
>
> *(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 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.*
>
> ***188 Jurisdiction over trade disputes and employment grievances***
>
> *(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 Relations 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 employee 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 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.

Part 20

234 Validation of informal proceedings etc

(1) If anything which is required or authorised to be done by this Act is not done within the required time limit, or is done informally, the court or the tribunal may, if the matter is within its jurisdiction, on the application of a person interested, order—

(a) the extension of time within which the thing may be done; or
(b) the validation of the thing informally done.
...

Submissions

[31] Mr Nair submitted that s 188(4) of the ERA allows for the application of s 234(1) of the ERA, such that the appellant had the ability to apply for an extension of time to file her grievance. He submitted that the Judge erred in not invoking s 234(1) of the ERA.

[32] Mr Nair further submitted that the Judge's failure to invoke s 234(1) was a denial of the appellant's right to access the justice system and have her grievance determined, in accordance with s 15(2) of the Constitution, which provides:

Access to courts or tribunals

15 (1) ...

(2) Every party to a civil dispute has the right to have the matter determined by a court of law or if appropriate, by an independent and impartial tribunal.

[33] Mr Nair further submitted that this Court should take judicial notice of the enactment on 28 November 2023 of the Employment Relations (Amendment) Act 2023 (Act No. 26 of 2023) pursuant to which s 188(4) was amended by increasing the time to file a grievance to six months after the grievance arose. He submitted that this Court should take judicial notice of the amendment, allow the appeal, and order that the substantive grievance be determined by the Tribunal, on its merits.

[34] Ms Solimailagi submitted that the Judge was correct, and there is no provision to extend time for filing a grievance out of time when it concerns an employee in an ESI. She submitted that s 234(1) of the ERA must be applied in accordance with s 187 of that Act, which makes provision for the application of other parts of the Act. She submitted that employment grievances in ESIs can only be determined by the Tribunal and the Employment Court in accordance with s 188(4); and such grievances must be lodged or filed within 21 days of the grievance arising.

Discussion

[35] When the relevant sections are considered together, it is clear that Ms Solimailagi's submission is correct.

[36] Sections 187 and 188 are in Part 19 of the Act, which is headed "Essential Services and Industries". Section 234 is in Part 20 of the Act, which is headed "Institutions" and contains provisions relating to Mediation Services, the Tribunal, and the Employment Court and general procedural provisions, including s 234. In Part 19, s 187(1) provides that other Parts of the Act do not apply to ESIs except as provided in s 187(2). Section 187(2) provides a general exception (where there is no inconsistency with Part 19) where the listed Parts will apply to ESIs. Part 20 is not listed as a general exception.

[37] Section 188(3) expressly provides that Part 20 shall not apply to ESIs, except as provided under s 188(4). Section 188(4) expressly prescribes the extent of application of Part 20

to employment grievances in ESIs. It provides that *[any] employment grievance between a worker and employee in essential services and industries ... 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, ...* (emphasis added). The application of s 234 is therefore limited by the express proviso in s 188(4) as to the 21 day time limit for filing a grievance. Given the express terms of s 188(3) and (4), it is clear that s 234 cannot be used to extend time for an employee in an ESI to file an employment grievance.

[38] I reject Mr Nair's submission that the Court should take judicial notice of the fact that the time limit of 21 days was extended by the Employment Relations (Amendment) Act 2023 in November 2023, and allow the appellant's appeal. To do so would be to give retrospective effect to the amendment, and thus to ignore the provisions of s 188(5) (also inserted by way of the November 2023 amendment):

> *(5) Subsection (4) does not have retrospective effect and only applies to actions filed after the date of commencement of the Employment Relations (Amendment) Act 2023.*

[39] Further, I accept Ms Solimailagi's submission that upholding the findings of the Tribunal and the Employment Court as to the 21-day times does not constitute a denial of the appellant's constitutional right of access to justice. The appellant's right to justice was not impeded by the time limit, she was simply required to avail herself of that right within the time prescribed by law. I have concluded that the appellant's fourth ground of appeal cannot succeed.

Winter, JA

[40] I agree.

ORDERS

(1) The appellant's appeal is dismissed.

(2) Each party is to bear their own costs.

Hon. Justice Filimone Jitoko
PRESIDENT, COURT OF APPEAL

Hon. Justice Pamela Andrews
JUSTICE OF APPEAL

Hon. Justice Gerard Winter
JUSTICE OF APPEAL