

THE STATE

v.

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PUBLIC SERVICE COMMISSION

ex parte

MANUNIVAVALAGI KOROVULAVULA

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[HIGH COURT, 1993 (Byrne J) 8 December]

Public Service- statutory office- whether terminable at will- whether subject to judicial review- contract of service- whether termination subject to judicial review- Traffic Act (Cap 176) Section 5- Interpretation Act (Cap 7) Section 44.

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The Plaintiff was employed as Controller of Road Transport under a contract of service. He was also appointed the Principal Licencing Authority under the Traffic Act. His contract was terminated and the appointment revoked. He sought judicial review of both decisions. The High Court HELD: (1) that the statutory appointment was terminable at will and (2) that the alleged breach of the contract of employment did not give rise to public law remedies.

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Cases cited:

Ainsworth v. Criminal Justice Commission (1992) 66 ALJR 271
Chief Constable of the North Wales Police v. Evans [1982] 2 All E.R. 141
Council of Civil Service Unions v Minister for the Civil Service
 [1985] A.C. 374

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Coutts v. The Commonwealth of Australia (1985) 59 ALJR 548
Malloch v Aberdeen Corp [1971] 2 All E.R. 1278
Minister of Energy v Petrocorp Exploration Ltd [1989] 1 NZLR 348
R. v. BBC ex parte Lavelle [1983] 1 All E.R. 241
R. v. Civil Service Appeal Board, ex parte Bruce [1988] 3 All E.R. 686
R. v. East Berkshire Health Authority, ex parte Walsh [1984]

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3 All E.R. 425
R v. Panel on Take-overs and Mergers, ex parte Datafin Plc and Anor
 [1987] 1 Q.B. 185

R. v Stratford-upon-Avon Corporation (1670) 1 Lev. 291
Reg. v. National Joint Council for the Craft of Dental Technicians
(Disputes Committee), ex parte Neate [1953] 1 Q.B. 704

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Reilly v The King [1934] A.C. 176
Ridge v Baldwin [1964] A.C. 40
Riordan v. The War Office [1959] 3 All E.R. 552
Stevenson v United Road Transport Union [1977] 2 All E.R. 941
Vine v National Dock Labour Board [1956] 3 All E.R. 939
Weddel v Tepper (1980) ICR 286

Motion for judicial review in the High Court.

G.P. Shankar for the Applicant

A. Cope for the Respondent

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Byrne J:

This is an application for Judicial Review, alternatively a claim for damages and costs in respect of two separate decisions:

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- (1) The decision of the Minister for Communications, Works and Transport on or about 8th February 1988 to terminate the Applicant's appointment as Principal Licensing Authority under the Traffic Act Cap. 176;
- (2) The decision of the Public Service Commission on or about 23rd March 1988 to terminate the Applicant's appointment as Controller of Road Transport.

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Leave to apply for Judicial Review was granted by Jesuratnam J. on 3rd November 1988. The application raises interesting questions as to the continuation or otherwise of the former Royal Prerogative following the declaration of Fiji Republic in 1987 in the guise of a State Prerogative and the rights of the State, if any, to dismiss the Applicant at will from a position to which he was appointed by the Minister for Communication, Works and Transport on 18th August 1987. It also raises for decision the question whether a person appointed under an Agreement of Service by the Government of Fiji through its agent the Public Service Commission has any right to judicially review a decision by the Government to dismiss him pursuant to the terms of an Agreement of Service. I have taken comprehensive written and oral submissions from counsel for the parties in which much case law and academic writing has been cited to me. If at the end of this judgment I have not mentioned all the authorities so cited to me it is only because, having read them, I consider that they do not bear directly on the issues before the Court or because the law stated in such decisions has been adequately stated in other cases which I shall mention in varying degrees of detail.

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THE FACTS

The Applicant is a former public servant who was re-engaged by the Public Service Commission to assume the positions of Controller of Road Transport and Principal Licensing Authority under the Traffic Act. His appointment as Principal Licensing Authority was made under Section 5 of the Traffic Act by the Minister for Communications, Works and Transport ("the Minister"). Section 5(1) of the Act is as

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follows:

"The Minister may appoint a Principal Licensing Authority who shall be charged with the licensing of motor vehicles and drivers and matters incidental thereto".

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By an agreement in writing ("The Agreement of Service") dated 17th August 1987 the Applicant was appointed as Controller of Road Transport for a period of two years. I shall have occasion to refer to particular Clauses of the Agreement of Service later but Clauses 2, 3, 5, 6, 7 and 8 may be mentioned here briefly so as to see at a glance the questions of law raised by this application.

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In Clause 2 the Applicant agreed to faithfully perform the duties of the Controller of Road Transport or any other duties on which the Government might think it desirable to employ him for the period of his service and to act in all respects in accordance with directions given to him by the Government or any of his superior officers.

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It also required the Applicant to conform to the Public Service Act and Regulations, the Fiji Overseas Service Regulations and to the General Orders relating to officers in the service of the Government except in so far as those regulations or General Orders apply only to officers on the permanent staff.

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Clause 3 fixed the Applicant's remuneration as \$25,000.00 per annum.

Clause 5 entitled the Applicant to leave in accordance with the 1972 Leave Regulations of the Public Service.

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Under Clause 6, which was without prejudice to Paragraph 8, the Government could terminate the Agreement:

(a) by giving the Applicant not less than three months' notice in writing;

(b) at any time by giving the Applicant one month's salary in lieu of three months' notice. Or, in the event of the applicant being certified as medically unfit for service under the Agreement, by giving him one month's notice in writing of the date on which the Agreement would be terminated.

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By Clause 8, if the Government was satisfied after reasonable inquiries that the Applicant had been guilty of misconduct or a breach of any term of the Agreement, it could summarily dismiss him after which all rights and advantages given to him by the Agreement would cease.

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Affidavits have been filed as usual by the parties and from these the following matters emerge: It is clear that since December 1987 until the date of his dismissal from both positions, the Applicant did not enjoy a happy working

relationship with his Minister. It appears that the principal reason for this was that the Applicant believed in applying the law, i.e., the Traffic Act, strictly and not flexibly even if the Minister thought the latter preferable in particular cases. The Applicant states in his first affidavit in support of his application for leave for Judicial Review that the Minister since December 1987 questioned decisions made by the Applicant because he was "not accommodating political demands" because the Applicant honestly based his decisions in accordance with the law. This resulted in a meeting between the Minister and himself at which the Minister informed the Applicant that he intended to make some changes in the Department of Road Transport.

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This is not denied by Poseci Waqalevu Bune the then Secretary of the Public Service Commission who however in an affidavit sworn on the 9th of June 1988, states that he was not aware that the Minister had informed the Applicant that he intended to make changes in the Department of Road Transport.

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On 8th February 1988 the Applicant received a letter from the Permanent Secretary for Works and Transport informing him that his appointment as Principal Licensing Authority was terminated with effect from 8th February 1988. The Applicant immediately replied pointing out to the Secretary of the Public Service Commission the terms of the Naviti Declaration of 16th January 1988 which briefly required civil servants and Ministers to maintain the highest degree of integrity and to prevent corrupt or illegal practices or activities.

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The Applicant complains that Mr. Bune did not respond to his memorandum of the 10th of February 1988 because he found it difficult to try to accommodate the Applicant's wishes as he allegedly was trying to suggest that the Public Service Commission should attempt to persuade the Minister to alter his decision to cancel the Applicant's appointment as the Principal Licensing Authority.

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According to the Applicant on or about 23rd March 1988 he was called urgently to see Mr. Bune in his office. He was then told by Mr. Bune that he had received submissions from the Minister, the contents of which or the nature of any allegation or charge were never communicated to the Applicant. The Applicant says that Mr. Bune then informed him that the Public Service Commission had decided to ask the Applicant to resign, and if he did not, he would be dismissed.

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Mr. Bune does not deny this allegation but says that since the Applicant had earlier stated that he could no longer work with his Minister and was contracted to work as the Controller of Road Transport and not as the Principal Licensing Authority, he had no option but request the Applicant to tender his resignation.

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On being so told the Applicant informed Mr. Bune that he did not intend to resign because he had not done anything wrong to warrant his resignation. Mr. Bune then suggested an approach to the Minister to allow the Applicant to redeem himself but the Applicant replied that because he had done nothing

he saw no reason to talk to the Minister.

- A According to Mr. Bune he spoke to the Minister who informed him that the Applicant was very stubborn and insistent that he would not follow lawful ministerial directions and therefore he could see little point in discussing the issue further with the Applicant. Mr. Bune then informed the Applicant that, having spoken to the Minister, he had no option but to implement the decision of the Public Service Commission to terminate the Applicant's appointment pursuant to paragraph 6(b) of the Agreement. I set out here a copy of the letter from Mr. Bune to the Applicant of the 23rd of March 1988.
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"PF3628

23 March 1988

Mr M D Korovulavula, Controller of Road Transport
ufs Permanent Secretary for Works and Transport

C TERMINATION OF AGREEMENT OF SERVICE

In our discussion this morning, Korovulavula/Bune, I informed you of the decision taken by the Commission at its meeting on 22 March, 1988.

- D You informed me during the discussion that you could not see your way clear, given the situation as you saw it, to resign your appointment as Controller of Road Transport.

That being your decision I have no option but to terminate your Agreement of Service with effect from 24 March 1988 under Clause 6(b) of the said Agreement. Please arrange with your Accountant for the payment of your one month salary in lieu of notice.

- E Will you please hand over to Mr K K Chandra all the inventory of your office before you leave.

May I thank you for the services you have rendered in the last seven months as Controller of Road Transport and wish you well in your future endeavour.

- F (Sgd.)
Poseci W Bune
Secretary, Public Service Commission

cc: Gazette Clerk"

- G Mr. Bune finally deposed in his affidavit that the decision by the Commission to terminate the Applicant's employment under Paragraph 6(b) of the Agreement was proper, fair and reasonable in view of the statement made by the Applicant to the Fiji Times and reported in the issue of that paper of the 25th of February 1988. It would seem that the following statement of the Applicant reported by the newspaper and not denied by the Applicant rankled with the Minister and the Public Service Commission.

"Asked to explain why he had been sidelined, Mr. Korovulavula said, "The minister wants someone else to be PLA.

There are certain things which he wants me to do which I thought wasn't right.

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I looked at it from the point of view of law. If I see things are not being done according to law, I will not do it.

I always do what is right, he said."

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The Applicant seeks an order of Certiorari

- (1) to quash the decision of the Minister terminating the Applicant's appointment as Principal Licensing Authority;
- (2) a declaration that the purported termination of the Applicant's appointment as Controller of Road Transport by the Minister is null and void in that it was done wrongfully and in breach of the principles of natural justice and similarly against the Public Service Commission in respect of its dismissal of the Applicant as Controller of Road Transport together with damages and costs.

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The grounds on which relief is requested are:

- (1) that the Minister failed to accord the Applicant any hearing before he decided to remove the Applicant from the office of Principal Licensing Authority and so denied the Applicant natural justice;
- (2) that the Minister acted unreasonably and took extraneous matters into consideration in reaching his decision;
- (3) that the Public Service Commission was wrong in summarily dismissing the Applicant without giving him any reason for such dismissal or without giving him details of any charges or allegations against him and failed to give the Applicant an opportunity to answer or explain the matters alleged against him;
- (4) that the decision by the Public Service Commission to summarily dismiss the Applicant in the absence of misconduct, incompetence or failure to discharge his duties lawfully is unfair and unreasonable.

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Although not strictly stated as a ground for relief before me counsel for the Applicant stated that essentially the Applicant claims that the Public Service Commission was wrong in dismissing him because it did not exercise its own

A independent judgment but acted at the dictation of the Minister, the Honourable Apisai Tora. This is referred to in the last paragraph of an affidavit sworn by the Applicant on the 3rd of November 1988 and no objection was taken by counsel for the Respondent to this ground being alleged by the Applicant.

B I now proceed to consider the submissions of counsel and the law applicable to this application. It is convenient to deal first with the Applicant's dismissal as Principal Licensing Authority but first I must deal with a preliminary objection by the Respondent that there has been unreasonable delay by the Applicant in seeking Judicial Review of the decision to dismiss him as Principal Licensing Authority. The short answer to this objection is that the Respondent agreed to amendments to the Applicant's statement under Order 53 covering the Applicant's dismissal as Principal Licensing Authority. The amendments were allowed by Jesuratnam J. on 3rd November 1988 and so there is no substance in this preliminary objection. I agree with the objection taken by counsel for the Respondent to paragraphs 16 and 17 of the affidavit of the Applicant of the 3rd of November 1988 in support of his application for leave to allege further grounds. These two paragraphs are actually submissions on the law or facts and as such should not form part of the affidavit.

D I have noted a disturbing tendency in affidavits sworn in support of numerous actions in this country to include what in fact are submissions on law rather than allegations of facts. The practice is to be deplored and whilst in the instant case I should strictly speaking ignore the paragraphs complained of by the Respondent I am prepared to overlook the error in this case because I consider no injustice will be done by so doing. For my part however in all future cases I will not hesitate to strike out the part or parts of any affidavit affected by this vice.

THE PREROGATIVE QUESTION

F I first deal with the question of the right of the Minister to dismiss the Applicant at pleasure from the position of Principal Licensing Authority. If this right exists as claimed by the Respondent under Section 5 of the Traffic Act then its existence must depend on whether the old law as to the right of the Crown to dismiss at will still applies in Fiji. Under the common law of England apart from judges and others whose tenure of office is governed by statute, all servants and officers of the Crown hold office at pleasure. It has always been held that such an officer has no right to be heard before he is dismissed for the simple reason that as the person having the power of dismissal need not have anything against the officer he need not give any reason. That was stated as long ago as 1670 in R. v. Stratford-upon-Avon Corporation (1670) 1 Lev. 291 and later cases on the subject are mentioned by Lord Reid at pp.71-72 of his judgment in Ridge v. Baldwin [1964] A.C. 40 at p.66. In Riordan v. The War Office [1959] 3 All E.R. 552 Diplock J as he then was quoted with approval the statement by Mr. Stuart Robertson in his Book "Civil Proceedings By And

Against The Crown (1908) at p.357 where he says:

“The Crown’s absolute power of dismissal can only be restricted by statute, and anything, short of a statute, which purports to restrict it, is void as contrary to public policy.”

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The question in the present case is whether, as a result of the declaration of Fiji as a Republic in 1987, the old Crown Prerogative still exists. In my judgment it does because of Section 2(a) of the Existing Laws Decree 1987 of the Interim Military Government under which existing laws, apart from the Fiji Constitution itself, are continued. In my judgment this must include the common law relating to the prerogative.

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Consequently I hold that in the absence of any authority to the contrary the Minister was not obliged to give any reasons for his dismissal of the Applicant as Principal Licensing Authority and that the Applicant had no right to be heard in respect of that dismissal.

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This principle was confirmed by the High Court of Australia in Coutts v. The Commonwealth of Australia (1985) 59 ALJR 548 where the Court held that the appointment of an officer of the Royal Australian Air Force had been validly terminated pursuant to the power to terminate his appointment at the pleasure of the Governor-General, and he was not entitled to an opportunity to be heard.

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Counsel for the Applicant contends that the Applicant could not lawfully be dismissed at pleasure by the Minister and relies on remarks made first by Lord Atkin in Reilly v. The King [1934] A.C. at 176 and 179 and Lord Justice May in R. v. Civil Service Appeal Board, ex Parte Bruce [1988] 3 All E.R. 686.

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In Reilly’s case the Appellant was appointed by letters patent to be a member of a Board established by statute of Canada which specified the period of the appointment and the salary attached to it. During the currency of the appointment, the Parliament of Canada abolished the office and did not provide any compensation to the Appellant. By a Petition of Right he claimed damages for breach of contract. The Privy Council held that the claim failed because so far as the Appellant’s rights were contractual further performance of the contract had become impossible by statute.

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The Privy Council further held that if the terms of an appointment prescribe its period and provide expressly that it may be terminated for cause, a power to dismiss at pleasure cannot be implied. Lord Atkin said at p.179:

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“If the terms of the appointment definitely prescribe a term and expressly provide for a power to determine “for cause” it appears necessarily to follow that any implication of a power to dismiss at pleasure is excluded.”

The distinction between Reilly’s case and the instant should be immediately

A obvious; whereas Mr. Reilly was appointed to his post by letters patent, i.e. by contract, the Applicant here was not. His appointment as Principal Licensing Authority stems clearly in my view from Section 5 of the Traffic Act and therefore Lord Atkin's remark does not assist me here. In R. v. Civil Service Appeal Board ex parte Bruce (supra) counsel for the Applicant relies on the judgment of Lord Justice May who mentions Lord Atkin's remark in Reilly at p.692 of the report. However in my view this likewise does not assist me here because it must be noted that at p.698 letter (e) the other member of the Court B Roch J, said although there was nothing unconstitutional about; the Crown entering into contracts of employment with civil servants, this must be subject to the qualification that the Crown cannot deprive itself by contract of its prerogative power to dismiss civil servants. Here the Respondent argues, and I agree, that the power to appoint a person to the position of Principal Licensing Authority rested only with the Minister of Communications, Works and Transport under Section 5(1) of the Traffic Act. The Agreement of Service C dated 17th August 1987 makes no mention of any appointment as Principal Licensing Authority, only that of Controller of Road Transport. However in this context Section 5 cannot stand alone; it must be read in conjunction with Section 44 of the Interpretation Act Cap.7 which reads, so far as relevant:

D "Where by or under any written law a power or duty is conferred or imposed upon any person or authority to make any appointment or to constitute or establish any board , commission, committee or similar body, then unless a contrary intention appears, the person or authority having such power or duty shall also have the power to remove, suspend, dismiss or revoke the appointment, of and to re-appoint or reinstate, E any person appointed in the exercise of the power or duty"

F Counsel for the Applicant also mentions the House of Lords decision in Council of Civil Service Unions v. Minister for the Civil Service [1985] A.C.374 where the House made it clear that the powers of the Court to grant Judicial Review could not be ousted merely by invoking the word "prerogative", The majority of Their Lordships indicated that whether Judicial Review of the exercise of prerogative power is open depends upon the subject matter and in particular whether it is justiciable. It is true that in his affidavit in reply Poseci Lune states in paragraph 4 that "The said Minister responsible for the Act has the sole prerogative for appointment of the Principal Licensing Authority" but I G interpret his use of the word prerogative as meaning simply "right".

I am clearly of the opinion that the appointment of the Applicant as Principal Licensing Authority was in no way contractual but based purely on the exercise of the State Prerogative for the reasons which I have given.

Even if this be true however the Applicant argues that he should have been

given a right to explain or persuade the Minister to reconsider and quotes from Professor Aronson on "Review of Administrative Action" (Aronson and Franklin) at p.125 where the learned Professor states that to hold otherwise is contrary to contemporary thinking.

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Similar views are expressed by Sir William Wade in the Sixth Edition of his "Administrative Law" at pp566-7. Professor Wade says for example:

"If the officer is subject to some accusation, justice requires that he should be allowed a fair opportunity to defend himself, whatever the terms of his tenure. To deny it to him is to confuse the substance of the decision, which may be based on any reason at all, with the procedure which ought first to be followed."

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Whilst as a judge at first instance I have considerable sympathy with these views which seem to me to be in accord with the increasing tendency of the Courts in the last twenty years to extend the right to be heard in one's own cause, nevertheless as such a judge, and in the light of the authorities I have mentioned, I believe any move in this direction should be made either by the Parliament or the Court of Appeal. Parliament could effect such a reform by simply amending Section 44 of the Interpretation Act if it were so desired.

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For these reasons I therefore reject the application for Judicial Review so far as it relates to the position of Principal Licensing Authority.

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THE CONTRACTUAL QUESTION

I proceed now to consider the Applicant's argument in relation to his dismissal as Controller of Road Transport.

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Here the Applicant argues that the Public Service Commission owed him a duty to act in a procedurally fair manner. It is stated that the Commission was set up by Statute with reasonably wide powers. It is submitted that it was under a duty to the Applicant to:

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- (a) make investigations into his conduct properly;
- (b) give full and proper opportunity to the Applicant to present his case before being dismissed;
- (c) on receipt of any explanation by the Applicant to consider the matter fairly, act on its own findings or evaluation of the evidence to make a fair decision, but it was not entitled to act on the dictation of the Minister.

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The Applicant claims there has been grave injustice because the decision to dismiss him as the Controller of Road Transport was not made by the Public Service Commission which alone had the powers but it was made by the

Minister.

A It is submitted that the action by the Public Service Commission ought to have been in proportion to the gravity of the Applicant's misconduct or fault if any and not without any regard to the merits or gravity of the complaint.

B It is further said that the Applicant was employed in the Fiji Public Service, albeit on contract, and that by the powers reposing in it, the Public Service Commission was not entitled to exercise the power of dismissal arbitrarily or on dictation but only after giving the Applicant all reasonable opportunity to state his own case.

C Here the question for decision is whether, notwithstanding the fact that the Applicant was appointed by the Public Service Commission on behalf of the Government of Fiji and that he was required to conform to the Public Service Act and the regulations made thereunder, his employment contained sufficient public elements to attract the application of public law by way of Judicial Review.

D For its part the Respondent argues that no question of public law arises in this case because the Applicant was not a public servant at the relevant time. Rather he was employed as an ordinary contract officer under an agreement made by the Public Service Commission on behalf of the Government of Fiji and which contained in essence purely private law terms and remedies and therefore the Applicant's dismissal as Controller of Road Transport cannot be made the subject of Judicial Review. Here it is necessary to consider certain terms of the Agreement of Service. Paragraph 2(a) reads: "The officer will:

- E (a) diligently and faithfully perform the duties of Controller of Road Transport or any other duties on which the Government may think it desirable to employ him for a period of service of two years from 1987;
- F (b) act in all respects in accordance with directions given to him by the Government or by any of his superior officers."

Paragraph 2(d) so far as relevant reads:

G "Conform to the Public Service Act and the Regulations made thereunder, the Fiji Overseas Service Regulations and to the General Orders of the Government relating to officers in the service of the Government for the time being in force except in so far as such Regulations or General Orders are only applicable to officers on the permanent staff or are varied by the terms of this Agreement and to the Financial and Stores Regulations of the Government for the time being in force and amended from time to time."

Paragraph 3(a) fixed the Applicant's annual salary at \$25,000.00.

Paragraph 5 reads:

"The officer shall be entitled to leave in accordance with the 1972 Leave Regulations."

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Paragraph 6 reads:

"Without prejudice to the provisions of paragraph 8 (relating to dismissal) Government may terminate this Agreement:

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- (a) by giving the officer not less than three months' notice in writing of the date upon which the Agreement will be terminated;
- (b) at anytime by giving the officer one month's salary in lieu of the notice aforesaid;
- (c) in the event of the officer being certified by a Government medical officer as being medically unfit for service under this Agreement, by giving him one month's notice in writing of the date upon which the Agreement will be terminated. "

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Paragraph 8 reads:

"If after reasonable inquiries Government is satisfied that the officer has been guilty of misconduct or a breach of any term of this Agreement, the officer may be summarily dismissed by the Government and upon such dismissal all rights and advantages reserved to him n under this Agreement shall cease."

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I am satisfied that the Agreement of Service was made under power given by Section 8(1) of the Fiji Service Commission and Public Service Decree 1987 which gives the Public Service Commission power to make appointments to public offices and the Public Service Commission Regulations 1987. Clause 16 of the Regulations reads:

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"The Commission may offer an appointment on contract for a fixed period to any person, whether or not that person already holds an appointment and may make the acceptance of such an offer a condition of appointment of such a person."

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Clause 26(c) of the Regulations reads:

"Where the officer is on contract his appointment shall be terminated in accordance with the terms of his contract."

A Although Regulation 2(1)(c) defines "appointment" as including the engagement in a public office of a person on contract terms of service it is not clear in my view from the regulations read as a whole that any individual appointed by a contract necessarily has any public law rights provided by statute. Rather in my judgment it is intended that his rights must depend on the terms of his contract, as I find to be the case here.

B In R. v. East Berkshire Health Authority ex parte Walsh [1984] 3 All E.R. 425 the English Court of Appeal had occasion to consider three important English decisions since 1956. These were Vine v. National Dock Labour Board [1956] 3 All E.R.939, Ridge v. Baldwin [1964] A.C.40 and Malloch v. Aberdeen Corp [1971] 2 All E.R. 1278.

C Walsh's case concerned a senior nursing officer who was employed by the Respondent Health Authority under a contract of employment which, pursuant to the National Health Service (Remuneration and Conditions of Service) Regulations 1974, incorporated terms and conditions approved by the Secretary of State for Social Services. In August 1982 the District Nursing Officer suspended the Applicant from duty and later purported to terminate his employment with the Health Authority. The Applicant sought judicial review of the dismissal on the grounds that the District Nursing Officer had acted ultra vires in dismissing him and there had been breach of the rules of natural justice in the procedures leading up to the dismissal. The judge at first instance held that the Applicant's rights were of a sufficiently public nature to entitle him to seek public law remedies or, alternatively that if he was not entitled to an order of certiorari he could, under RSC Ord 53, r 9(5) continue the action as though it had been begun by writ.

E On appeal by the Health Authority, the Court of Appeal upheld the appeal for reasons which I shall give shortly.

F At p.429 Sir John Donaldson M.R. said that none of the three decisions of the House of Lords which he had mentioned was directly concerned with the scope of judicial review. As to Malloch's case on which the Applicant here places much reliance, Sir John Donaldson said that Malloch's case was a Scottish proceeding in which the remedy of production and reduction was claimed. Although this was similar to certiorari, it is available whether or not the claim involves the "public" or "administrative" law.

G He then went on to quote remarks of Lord Reid in Ridge v. Baldwin [1963] A.C. 40 and in Malloch's case. He also quoted Lord Wilberforce in the latter case and because I consider the three quotations important for the purpose of deciding this case, rather than paraphrase them, I shall quote Sir John Donaldson direct.

"In Ridge v. Baldwin [1963] 2 All ER 66 at 71, [1964] AC40 at 65 Lord Reid classified dismissals under three heads in

terms of the right to be heard. They were (a) dismissal by a master, (b) dismissal from an office held during pleasure and (c) dismissal from an office where there must be something against a man to warrant his dismissal. He held that in case (b) there was no right to be heard and that in case (c) there was always a right to be heard. Dealing with master and servant cases (case (a)) he said:

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‘The law regarding master and servant is not in doubt. There cannot be specific performance of a contract of service and the master can terminate the contract with his servant at any time and for any reason or for none. But if he does so in a manner not warranted by the contract he must pay damages for breach of contract. So the question in a pure case of master and servant does not at all depend on whether the master has heard the servant in his own defence: it depends on whether the facts emerging at the trial prove breach of contract. But this kind of case can resemble dismissal from an office where the body employing the man is under some statutory or other restriction as to the kind of contract which it can make with its servants, or the grounds on which it can dismiss them.’

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Lord Reid was also a member of the House of Lords in Malloch's case [1971] 2 All ER 1278 at 1282-1283, [1971] 1 WLR 1578 at 1582, in which he said:

‘An elected public body is in a very different position from a private employer. Many of its servants in the lower grades are in the same position as servants of a private employer. But many in higher grades or “offices” are given special statutory status or protection. The right of a man to be heard in his own defence is the most elementary protection of all and, where a statutory form of protection would be less effective if it did not carry with it a right to be heard, I would not find it difficult to imply this right. Here it appears to me that there is a plain implication to that effect in the [Public Schools (Scotland) Teachers Act 1882].’

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Lord Wilberforce said [1971] 1 All ER 1278 at 1284, [1971] 1 WLR 1578 at 1595:

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‘One may accept that if there are relationships in which all requirements of the observance of rules of natural justice are excluded (and I do not wish to assume that this is inevitably so), these must be confined to what have been called “pure master and servant cases”, which I take to mean cases in which

A there is no element of public employment or service, no support by statute, nothing in the nature of an office or a status which is capable of protection. If any of these elements exist, then, in my opinion, whatever the terminology used, and even though in some inter partes aspects the relationship may be called that of master and servant, there may be essential procedural requirements to be observed, and failure to observe them may result in a dismissal being declared to be void.'

B Later he said [1971] 2 All ER 1278 at 1295, [1971] 1 WLR 1578 at 1595:

C 'Statutory provisions similar to those on which the employment rested would tend to show, to my mind, in England or in Scotland, that it was one of a sufficiently public character, or one partaking sufficiently of the nature of an offence, to attract appropriate remedies of administrative law.'

These extracts are quoted in full by counsel for the Applicant who however fails to then quote all the next paragraph by Sir John Donaldson on p.430 [1984] 3 All ER letters (f) to (j) where he said:

D "In all three cases there was a special statutory provision bearing directly on the right of a public authority to dismiss the plaintiff. In Vine's case the employment was under the statutory dock labour scheme and the issue concerned the statutory power to dismiss given by that scheme. In Ridge v. Baldwin the power of dismissal was conferred by statute (s 191(4) of the Municipal Corporations Act 1882). In Malloch's case again it was statutory

E (s 3 of the Public Schools (Scotland) Teachers Act 1882). As Lord Wilberforce said, it is the existence of these statutory provisions which injects the element of public law necessary in this context to attract the remedies of administrative law. Employment by a public authority does not per se inject any

F element of public law. Nor does the fact that the employee is in a 'higher grade' or is an 'officer'. This only makes it more likely that there will be special statutory restrictions on dismissal or other underpinning of his employment (see per Lord Reid in Malloch's case). It will be this underpinning and not the seniority which injects the element of public law. Still less can

G I find any warrant for equating public law with the interest of the public. If the public through parliament gives effect to that interest by means of statutory provisions, that is quite different, but the interest of the public per se is not sufficient."

Sir John Donaldson's opinion in the last paragraph I have quoted was endorsed by the other members of the Court. At p.439 Purchas L.J. said at letter (d):

"There is a danger of confusing the rights with their appropriate remedies enjoyed by an employee arising out of a private contract of employment with the performance by a public body of the duties imposed on it as part of the statutory terms under which it exercises" its powers. The former are appropriate for private remedies inter partes whether by action in the High Court or in the appropriate statutory tribunal while the latter are subject to the supervisory powers of the court under Ord 53."

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In my judgment whilst the passages quoted above from Ridge v. Baldwin and Malloch are no doubt true and can be applied to many cases, nevertheless each case must be decided on its own facts. In the instant case I have come to the clear conclusion that the Applicant's employment as Controller of Road Transport was governed by his Agreement of Service and that the mere fact that the Agreement was made by the Public Service Commission on behalf of the Government and contains several terms or phraseology which, if considered on their own, might well indicate that the Applicant's rights were governed by public law, in my judgment in his case they are not. I respectfully adopt the remarks of Sir John Donaldson in the last extract from his judgment in Walsh which I have cited and consider that they are equally apposite to the facts of this case.

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Counsel for the Applicant quotes from two other judgments, the first of May L.J. in R. v. Civil Service Appeal Board ex parte Bruce [1988] 3 All E.R. 686 and the second from Lloyd L.J. in R. v. Panel on Take-overs and Mergers, Ex parte Datafin PLC and Another [1987] 1 Q.B. 185.

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The first quotation from May L.J. is from p.694 where His Lordship is quoted as saying:

"There was sufficient public law element behind the applicant's dismissal from his appointment with the Inland Revenue and the hearing of this appeal by the Board to entitle him to apply for judicial review."

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In the Datafin case Lloyd L.J. is quoted as saying at p.847:

"But in between these extremes there is an area in which it is helpful to look not just at the source of the power but at the nature of the power. If the body in question is exercising public law functions, or if the exercise of its functions have public law consequences, then that may, as Mr. Lever submitted be sufficient to bring the body within the reach of judicial review."

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The purpose in mentioning these extracts is obviously to attempt to influence

this Court but the attempt must fail because both passages are quoted out of context.

A Immediately before the words quoted by May L.J. in Bruce's case the judge said this:

"In the instant case, however in the absence of a contract of service between him and the Crown I think that one is bound to hold that there was a sufficient public law element" etc.

B Similarly in the Datafin case counsel for the Applicant fails to quote the paragraph immediately preceding the remarks of Lloyd L.J. at p.847 of the report. His Lordship said this:

C "I do not agree that the source of the power is the sole test whether a body is subject to judicial review, nor do I so read Lord Diplock's speech. Of course the source of the power will often, perhaps usually, be decisive. If the source of power is a statute, or subordinate legislation under a statute, then clearly the body in question will be subject to judicial review. If, at the other end of the scale, the source of power is contractual, as in the case of private arbitration, then clearly the arbitrator is not subject to judicial review : see Reg. v. National Joint Council for the Craft of Dental Technicians (Disputes Committee), *Ex parte Neate* (1953) 1 Q.B. 704."

D In both these passages the two judges are specifically excepting from the scope of judicial review cases where the source of power is contractual as I find it to be here. I was referred by the Applicant to the New Zealand case of Minister of Energy v. Petrocorp Exploration Ltd. [1989] 1 NZLR 348 at 352 where the Court said:

E "To ensure that both Ministers and the Courts carry out their true constitutional roles it is important that, when Ministerial decisions are challenged, the Courts should have reliable evidence of the reasons why the Minister acted as he or she did. "

F Again it seems to me this remark is designed to persuade me that the Applicant was entitled to have reasons for (presumably) both his dismissals but the mere quotation of parts of judgments of itself does not assist a Court unless the quotations are relevant to the matter before the Court which is asked to apply the law stated in the quotation. Unless the facts and circumstances of the case on which a party seeks to rely are relevant to the case before the Court for decision the Court generally derives no assistance. Whilst as here I doubt whether any judge would disagree with the passage quoted from Minister of Energy v. Petrocorp Exploration Ltd. as a statement of general principle,

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nevertheless it can only assist me if it can be applied to the facts of the present case. In my judgment it cannot.

The decision in Minister of Energy v Petrocor Exploration Ltd. (supra) concerned the alleged right of cross-examination in judicial review proceedings and the New Zealand Court of Appeal held that this was not permitted as of right, and that in cases about Ministerial powers there was a delicate balance between the powers of the Minister and the role of the Court. The case was not concerned with matters such as are before me and so whilst not disputing the correctness of the remark made by the Court and cited by counsel for the Applicant, nevertheless in my view it cannot assist me in the resolution of this case. The issues are quite different.

The same comment may be made about the next case mentioned by counsel for the Applicant in his supplementary submission of 14th October 1993, Ainsworth v. Criminal Justice Commission (1992) 66 ALJR 271 at 276.

That case involved an application for prerogative writs against a statutory commission. It was only because the High Court held that the prerogative writs were not available or inappropriate that declaratory relief was considered - a similar situation to that in which the House of Lords found itself in the case of Chief Constable of the North Wales Police v. Evans [1982] 2 All E.R. 141. It was the absence of alternative remedies that led the High Court and the House of Lords to consider declaratory relief. Again the facts in Ainsworth were quite different from those in the instant case. A report very damaging to the business reputation of the Appellant Ainsworth had been published without giving him an opportunity to be heard on the matter and in the course of their joint judgment Mason CJ, Dawson, Toohey and Gaudron JJ said at 276:

"... the law proceeds on the basis that reputation itself is to be protected. And the Commission's report ... could only ensure that, thereafter, the appellants' reputation in Queensland would be of the worst kind."

Later at 278 the judges remark that although the report

"had no legal effect or consequence, it had the practical effect of blackening the appellants' reputations. Prima facie, at least, these matters suggest that the appellants are entitled to declaratory relief of the kind granted in Chief Constable v. Evans [1982] 1 WLR 1155."

Again as a general principle I do not doubt the statements of law made by the judges of the High Court but they were made in the light of the particular facts of the case before the High Court.

The case before this Court is very different. It involves the termination of a contract for which one would have thought the Applicant should more properly

seek redress by bringing an action for breach of contract and not judicial review.

A In the course of his judgment in Ainsworth at p.284 Brennan J. quoted with approval the observation of Lord Brightman in Chief Constable v. Evans at 153 that -

B “it would, to my mind, be regrettable if a litigant who establishes that he has been legally wronged, and particularly in so important a matter as the pursuit of his chosen profession, has to be sent away from a court of justice empty-handed save for an order for the recoupment of the expense to which he has been put in establishing a barren victory. “

C I cannot imagine any court of a western democracy nowadays being willing to dispute Lord Brightman’s view. But again it has to be considered in the context of the particular facts of the case then before the House of Lords.

D The areas of law in this case are completely different from those in Ainsworth and Chief Constable v. Evans; the only thing that links them is that the Respondents in all three cases are public authorities. Therefore the quotations made by counsel for the Applicant in this case do not assist me at all in reaching my decision and because I consider them irrelevant to the matter before me I reject counsel’s submission that the Applicant here is entitled to the declarations sought.

This leads me to the last matter requiring decision in this case, namely whether the rules of natural justice apply to a contractual employment relationship.

E The Applicant relies particularly on three English cases Weddel v. Tepper (1980) ICR 286, a decision of the English Court of Appeal, Stevenson v. United Road Transport Union [1977] 2 All E.R. 941 and the decision of Woolf J., as he then was, in R. v. BBC ex parte Lavelle [1983] 1 All E.R. 241.

F Counsel for the Applicant was kind enough to furnish the Court with a copy of the decision in Weddel v. Tepper where at p.296 Stephenson L.J. said:

G “Employers suspecting an employee of misconduct justifying dismissal cannot justify their dismissal simply by stating an honest belief in his guilt. There must be reasonable grounds, and they must act reasonably in all the circumstances, having regard to equity and the substantial merits of the case. They do not have regard to equity in particular if they do not give him an opportunity of explaining before dismissing him. And, it seems to me also that they do not have regard to equity or the substantial merits of the case when they jump to conclusions which it would have been reasonable to postpone in all the circumstances until they had gathered further evidence.”

Again, with respect, I hold this authority irrelevant to the matter before me. Weddel v. Tepper is a case which arises specifically from the United Kingdom employment protection legislation. In the then governing legislation (paragraph 6(8) of Schedule 1 of the Trade Union and Labour Relations Act 1974) an employer dismissing an employee had to show that it had acted "reasonably". This is a statutory concept and breach of it could lead to an award being made upon a finding of unfair dismissal. Neither the concept of reasonableness nor of unfair dismissal exist at common law, and they therefore are not applicable in Fiji. The employment protection legislation in the United Kingdom is additional to any common law contractual rights and remedies that an employee may have - in Fiji there is only the common law.

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Thus, valid though Lord Stephenson's remark doubtless was in relation to the English legislation, it does not assist me in deciding this case.

In Stevenson v. United Road Transport Union [1977] 2 All E.R. 941 at p.949 Buckley L.J. said:

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"In our judgment, a useful test can be formulated in this way. Where one party has a discretionary power to terminate the tenure or enjoyment by another of an employment or an office or a post or a privilege, is that power conditional on the party invested with the power being first satisfied on a particular point which involves investigating some matter on which the other party ought in fairness to be heard or to be allowed to give his explanation or put his case? If the answer to the question is Yes, then unless, before the power purports to have been exercised, the condition has been satisfied after the other party has been given a fair opportunity of being heard or of giving his explanation or putting his case, the power will not have been well exercised."

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These dicta were quoted with approval by Woolf J. in Lavelle's case [1983] 1 All ER 241 at p.252. Again I consider they do not assist me here. The facts in Stevenson and Lavelle were different from those in the instant case.

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In Stevenson the decision of the Court was based on the proper construction of a union rule and the Court held that the power of the executive committee of a union to dismiss an official of a union was exercisable only if the official had been given an opportunity to defend his conduct. Obviously no such question arises for decision in the present case.

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In Lavelle's case the Court held that it had no jurisdiction to interfere with the employee's dismissal in a pure master and servant situation where there was no protection of the employment beyond that afforded by the common law. However, where the employment was protected by, inter alia the employer being required to observe procedural requirements outside the common law

before dismissing the employee the Court did have jurisdiction to grant an injunction or declaration if the employer failed to observe the procedural requirements.

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Therefore in my judgment not only are the facts in Lavelle different from those in this case because I do not consider the Respondent here was required to observe any procedural requirements outside the common law before terminating the Applicant's employment but, equally importantly, Woolf J. affirmed the proposition which I have previously enunciated namely that in Fiji the Applicant's rights are those given only by the common law. In that regard Ridge v. Baldwin is still good law in Fiji and in my judgment does not assist the Applicant for reasons I have stated earlier in this judgment.

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It therefore follows that the Applicant's claim must fail and I therefore dismiss his application for judicial review and decline to make the declarations sought. I also order the Applicant to pay the Respondent's costs of these proceedings. There is one final matter on which I must comment, the late filing of a further affidavit by the Applicant on the 14th of October, 1993. This was done without leave of the Court and I have consequently not considered it.

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(Motion dismissed)

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(Editor's Note: An appeal against this judgment was allowed on 23 August 1994 - FCA Reps 94/415)

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