

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT

Civil Appeal No. ABU 0120 of 2016
(High Court Civil Action No. HBC 086 of 2008)

BETWEEN : 1. THE PERMANENT SECRETARY FOR WORKS & ENERGY
2. ATTORNEY GENERAL OF FIJI

Appellants

AND : MOHAMMED SHAMSHER KHAN

Respondent

Coram : Basnayake JA
Lecamwasam JA
Guneratne JA

Counsel : Ms. M. Motofaga with Mr A. A. Ali for the Appellants
Mr. R. Harper for the Respondent

Date of Hearing: 18 May 2018

Date of Judgment: 01 June 2018

JUDGMENT

Basnayake JA

[1] I agree with the reasoning, conclusion and proposed orders of Lecamwasam, JA.

Lecamwasam JA

[2] This is an appeal filed by the Appellant (The State) against the judgment of the High Court at Lautoka, dated 28th September 2016 on the following grounds of appeal:-

- (1) *That the learned Judge erred in law and in fact in holding that Khan was entitled to be treated as a permanent unestablished employee and be engaged on a single continuous contract from 2002 when there was no evidence to support the finding. This was also not a relief sought by the Respondent/Plaintiff.*
- (2) *That the learned Judge erred in fact and in law by ignoring the fact that no JIC Agreement was tendered in Court nor any reference made to specific provision in the JIC Agreement by the Respondent/Plaintiff.*
- (3) *That the learned Judge erred in fact and in law in holding that Khan should have been given notice and that PWD had failed to comply with the procedure set out under the JIC Agreement. The learned Judge also did not specify the procedures under the JIC Agreement that was breached and by ignoring the fact that the Respondent/Plaintiff had failed to raise or specify the procedures under the JIC Agreement that was breached.*
- (4) *That the learned Judge erred in law and in fact by accepting the Respondent's evidence :-*
 - a. *That workers were selected into the service to the exclusion of the Respondent;*
 - b. *That there were employees on the roll who received permanent benefits with no conclusive evidence;*
- (5) *That the Learned Judge erred in fact and in law in holding that "DW 4 said under cross-examination that Khan should have gotten permanent benefits" and failing to take this into account, the totality and consistency of DW4's evidence that there was no approved nominal roll and further that Khan's name was not in any approved nominal roll.*
- (6) *That the learned Judge erred in law when he did not make a finding that the respondent plaintiff was wrongfully terminated and/or that the appellant/defendant was guilty of discriminatory practice.*

[3] The facts are succinctly stated by the learned High Court Judge in his judgment from paragraphs 2 to 4 which I will take advantage in availing myself in verbatim:-

2. *Mohammed Shamsher Khan ("Khan") was employed at the Public Works Department ("PWD") in Lautoka from 1980 to 2005. Khan was always a non-permanent unestablished staff. He was engaged from time to time and his contract would terminate at the end of each project. In 2002, Khan's name was included in the nominal roll for unestablished staff. Usually, an unestablished employee whose name is put on the nominal roll becomes a permanent unestablished staff. Despite putting Khan's name on the roll, the Department would continue to engage him*

as a non-permanent unestablished staff. This, despite the fact that almost all the other staff on the roll was treated as permanent. In December 2005, Khan's employment was terminated at the end of a particular project (Tavua Project). He was not re-engaged on any new project thereafter.

3. *Notably, Khan had been lobbying the Permanent Secretary for Works & Energy and even the Office of the Ombudsman in 2002-3 about why he was not being treated as a permanent staff despite his long years of service. Khan would continue to lobby the PWD and the Ministry for Works after his termination and before re-engagement.*
4. *At some point in 2006, the Ministry wrote a particular letter to Khan offering to re-engage him as a non-permanent unestablished staff. Khan refused that. On 13 May 2008, Khan filed a writ of summons and statement of claim seeking damages for wrongful termination and also a declaration that the defendant, being a public authority, was, to quote from him, "guilty of discriminatory practice in its selection of workers into the unestablished cadre of the Public Works Department". The defendants refute the allegations. "*

[4] Since the issue of the pertinence of the JIC Agreement has been raised in Appeal, I will first deal with whether the Respondent/Plaintiff has referred to/relied on the JIC Agreement (*Joint Industrial Collective Agreement*) in his claim to any extent whatsoever.

The Respondent/Plaintiff in paragraphs 4 and 5 of the Statement of Claim states thus:-

- 4. The terms and conditions of the Plaintiff's service with the Defendant was covered by the JIC Agreement.*
- 5. The Defendants termination of the Plaintiff's employment was in breach of the said JIC Agreement in that the longest serving member would be the last to go."*

[5] With that background, it is clear that contrary to the assertion by the Appellant, the Respondent/Plaintiff has relied on the JIC Agreement, and had also referred to certain provisions of the Agreement, albeit without citing numerics. However, the Appellant is correct in the assertion that the said Agreement was not tendered to court since the respondent had not thought it necessary to be listed in the agreed bundle of documents

which consisted of 27 other documents as per Tab. 12 of the High Court Record (HCR), despite the JIC Agreement being an important document.

- [6] Further, even in the pre-trial conference, (at page 40 of the HCR) the first agreed issue reads thus:-

“Whether there has been non-compliance by the Plaintiff and/or the Defendant of the provisions of the Joint Industrial Collective Agreement”.

- [7] In addition to that, I find the Appellant has formulated his 2nd and 3rd grounds of appeal in reference to the JIC Agreement.

- [8] Hence, the reliance on and pertinence of the JIC Agreement are unquestionable. As such, I will at the outset address the 2nd and 3rd grounds of appeal which will decide the fate of this case as those two grounds stem from the JIC Agreement.

- [9] On perusal of the judgment, the learned High Court Judge in his final observation at paragraph 57 states as follows:-

*“It follows then that, if PWD had treated Khan properly as a permanent unestablished employee then it should have given Khan notice and **complied** with the **procedures set out under the JIC Agreement.**”*

- [10] Even though the learned High Court Judge had referred to the JIC Agreement, the non-specification of the procedures breached, especially in the absence of a reference document tendered to court, raises the pertinent question of whether the learned judge was fully apprised of the contents of the Agreement. Therefore I find the conclusion of the learned High Court Judge untenable as it is formulated in vague, sweeping terms rather than with the precision demanded of judicial opinion. As the entire Judgment is based on the JIC Agreement, the learned High Court Judge ought to have insisted on the contents of the Agreement be brought to his attention. There is no evidence before this court to prove otherwise.

[11] In light of the above reasoning, the decision of the learned High Court Judge based on the JIC Agreement, which the learned judge to all intents and purposes had not sighted, cannot be allowed to stand. The conclusion of the learned judge is not unlike “staging Hamlet without the Prince of Denmark”. Therefore I uphold the grounds of appeal 2 and 3 raised by the Appellant and allow the appeal.

[12] In view of this, it is redundant to consider the other grounds raised by the Appellant.

Guneratne JA

[13] I too agree with the reasoning, conclusion and proposed orders of Lecamwasam JA.

The Orders of the Court are:

1. *Appeal allowed.*
2. *The judgment of the Learned High Court Judge dated 28 September 2016 is set aside.*
3. *Considering the circumstances of this case, I am of the view that the parties be allowed to bear their own costs.*



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Hon. Justice E. Basnayake
JUSTICE OF APPEAL

A handwritten signature in blue ink, appearing to read "S. Lecamwasam".

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Hon. Justice S. Lecamwasam
JUSTICE OF APPEAL

A handwritten signature in blue ink, appearing to read "Almeida Guneratne".

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Hon. Justice Almeida Guneratne
JUSTICE OF APPEAL