IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

JUDICIAL REVIEW NO. HBJ 6 of 2009

IN THE MATTER of an application by **CARPENTERS FIJI LIMITED** for the Judicial Review under Order 53 of the HIGH Court Rules of Fiji.

AND

IN THE MATTER of the decision by **MEDIATION UNIT** established under the Employment Relations Promulgation 2007 dated 11th of November, 2008

THE STATE	:	**MEDIATION UNIT**
		1st Respondent
	:	**MINISTER FOR LABOUR, INDUSTRIAL RELATIONS AND EMPOLYMENT**
		2nd Respondent
	:	**PERMANENT SECRETARY FOR LABOUR, INDUSTRIAL RELATIONS AND EMPLOYMENT**
		3rd Respondent
	:	**B.P (S.S) COMPANY LIMITED & W.R. CARPENTERS GROUPS SALARIED STAFF ASSOCIATION FOR AND ON BEHALF OF ROSETTE SINGH**
		4th Respondent
EX-PARTE	:	**CARPENTERS FIJI LIMITED**
		Applicant
COUNSEL	:	Ms. B. Narayan for the Applicant
	:	Mr. A. Pratap for 1st, 2nd & 3rd Respondents
Date of Judgment	:	8th August, 2014

JUDGMENT

[1]. The applicant has applied for Judicial Review to this court pursuant to leave granted by a brother Judge of the court.

[2]. This application has been filed under Order 53 of the High Court Rules. By the said application the applicant has sought among other things for an order of certiorari and a decision to state that impugned decision is invalid, void and of no effect.

[3]. At the argument before this court counsel for the applicant submitted that they were not pursuing with ground F of the application. After submission both parties sought to file written submissions. Written submissions and a supplementary written submission on behalf of the first, second and third Respondent's have been filed, the applicant had relied on the written submissions filed at the leave stage.

Facts

[4]. The applicant is a trading company and the grievor had been working as a cashier.

[5]. It was submitted that the grievor who was employed as a Manager had been summarily dismissed from employment for grievous misconduct.

[6]. The union to which the grievor belonged had written to the applicant on 8.12.2006 stating that the dismissal was unjustified.

[7]. On 8.1.2007 the applicant has replied to the union justifying the summary dismissal on the grounds of embezzlement of funds.

[8]. The Union on 8.6.2007 had written to the Permanent Secretary thereafter about the existence of a trade dispute between the applicant and the union.

[9]. The Permanent Secretary on 24.8.07 replied refusing the report of dispute stating it had been reported after the lapse of one year.

[10]. It was submitted that subsequently the grievor had moved the Mediation Unit personally and the Mediation Unit had accepted her grievance and referred it to the Employment Relation Tribunal as the parties failed to resolve the dispute before the Mediation Unit.

[11]. Being aggrieved by the said decision the applicant had filed this application. The Respondents counsel raised a preliminary objection on jurisdiction stating that the jurisdiction to determine the issue is with the Employment Relation Tribunal and not the High Court, counsel for the applicant objected to this on the basis that the jurisdiction issue should have been taken at the outset at

the leave stage and not at this last stage. The court is of the view that the objection to jurisdiction should have been taken at the leave stage. Accordingly I over rule the preliminary objection of the Respondents.

Determination

[12]. The applicant submits that the Mediation Unit decision in accepting and referring the grievance of the grievor is wrong. It was argued that the grievance had been submitted to the Permanent Secretary and he had refused it on 24.8.07.

[13]. It was submitted that under Section 200(3) of the Employment Relation Promulgation 2007, once the Permanent Secretary had refused it, the grievance cannot be subsequently referred as a dispute or an employment grievance.

[14]. That the apparent dismissal of the grievance had occurred in 2004 August and subsequently the grievor had submitted the grievance in 2007 which is after three years which constitutes an inordinate delay.

[15]. That under S170(6) the Promulgation on employment disputes, cannot be accepted after 6 months from the date the dispute arose.

[16]. The Respondent submitted that when the grievance application was referred to Mediation the Respondent had attended the Mediation on two occasions and they had not challenged the acceptance of the grievance by the Permanent Secretary, but had attended the mediation. It was submitted that only when the first Respondent referred the matter to the Employment Relations Tribunal the applicant had challenged it by seeking Judicial Review. Accordingly, it was submitted that by the conduct of the applicant they cannot maintain this application, especially after participating before the Mediation Unit without opposing it on undue delay. The applicant is now precluded from raising the opposition of delay.

[17]. The applicant failed to answer or give an explanation to this allegation or to submit any material to state that they participated under protest.

[18]. The respondent submitted that after the Permanent Secretary had refused to accept the grievance submitted by the union, the union had not taken part in the proceedings that unfolded subsequently. It was submitted that the union had reported the grievance under the Trade Dispute Act.

[19]. Thereafter once the promulgation came to force the grievor had directly reported the grievance to the Hon. Minister who in turn had referred it to the Mediation Unit.

[20]. Section 200(3) of the Employment Relation Promulgation states as follows:

> ***If an employment grievance has been referred to mediation services or a dispute reported to the Permanent Secretary –***
>
> ***(a) the employment grievance cannot be subsequently reported as a dispute;***
>
> ***or***
>
> ***(b) the dispute cannot be subsequently referred to mediation services as if it were an employment grievance.***

[21]. The Respondent contends that this section is not applicable in the present case as it will be applicable only if the grievance that was refused by the Permanent Secretary had been made under the promulgation. However, the earlier grievance had not been reported under this promulgation. Subsequently the grievor herself has reported her grievance under this promulgation for the first time and therefore the Permanent Secretary had the jurisdiction to entertain this application.

[22]. The promulgation does not state that it has retrospective effect. In the absence of a retrospective effect the respondent argues that even if a grievance was reported under the Trade Dispute Act and has been rejected, when the promulgation came into operation, if there is sufficient compliance with the provisions of the promulgation then there is no bar for the grievor to file a fresh application of grievance under the promulgation. On a plain reading of the promulgation, the court is inclined to hold with the respondents' submission.

[23]. The respondent answering the opposition pertaining to the delay submitted that as per the facts of the present case the Employment Relations Promulgation does not provide a time period in which an employment grievance has to be lodged with the Mediation Unit. A plain reading of the promulgation clarifies this submission of the respondent. Eventhough under schedule 4 clause 3(1) it is stated that the grievance must be submitted within a period of 6 months, by paragraph 1(2) of schedule 4, in the case of dismissal the effect of this provision has been removed.

[24]. Paragraph 1(2) of Schedule 4 clearly states that if the grievance relates to a dismissal paragraph 2-6 will not apply.

[25]. The time limit of six months is in paragraph 3. However, since the grievance was pertaining to a dismissal as per paragraph 1(2), paragraph B will not apply, thus as submitted the time restriction place in S170(6) of promulgation fails to apply.

[26]. The applicant submitted that the Permanent Secretary cannot accept an employment grievance after six months from the date of the dispute. It is submitted that in this case the grievor had directly written to the Hon. Minister who in turn had referred the grievance to the Mediation Unit.

[27]. However, the applicant has failed to challenge this acceptance of the grievance by the Hon. Minister in this application for certiorari. The respondents have submitted two annexure TK1 and TK2. Those are two letters that the grievor has sent. In that she has explained her delay in reporting the grievance. It was submitted by the respondents that the grievor had been informed of a police action and that she was waiting for the outcome of the police action. It was submitted that if a complaint had been lodged with the police they would have investigated the issue and the grievor had been waiting for the outcome. It was submitted up to the date of the hearing of this application no police investigation had taken place and the delay in reporting the grievance was because the grievor was waiting for the police inquiry. The applicant had failed to answer this submission and in the absence of an explanation or denial on this issue court thinks that the grievor has reasonably explained the delay in reporting the grievance.

[28]. At the argument stage it was admitted that the grievance that was reported to the Mediation Unit had been submitted directly by the grievor. However, the grievor has not been made a party to this action. Even though both parties were given an opportunity to file their written submission on this issue, I find only the respondents have filed their written submissions. At the hearing, counsel for the applicant conceded that the grievor has personally submitted the grievance to Minister and accordingly relief "f" was withdrawn. In this context court holds that the grievor Rosette Singh should have been made a necessary party to this application.

[29]. As per Order 53 Rule 5(2) of the High Court Rules, it is clearly stated that "the notice of motion or summons must be served on all persons directly affected ...". In this instance the whole process started with the complaint of the grievor. As correctly submitted by the respondents' counsel the grievor has not been made a party to this hearing and no attempt has been made to make the grievor a party. The outcome of this case will directly affect the grievor.

[30]. Therefore the grievor is a necessary party who ought to have been made a party to this application.

[31]. In my view if the order sought would adversely affect a party who is not before the court that party must be deemed to be a necessary party. As I have stated earlier there was no application to add the grievor as a necessary party and at this late stage, in any event it cannot be allowed. I also hold the failure to add a necessary party as a respondent has to be regarded as fatal to this application.

[32]. The failure to bring all necessary parties before the court in an application for a writ of certiorari is fatal to this application.

[33]. In the notice of motion dated 10.4.12 pursuant to leave being granted on 23.3.12 the applicant has sought for an order of certiorari to remove the decision of the Mediation Unit dated 11.11.2008 whereby the Unit accepted and referred the grievance of the fourth named respondent to the Employment Relation Tribunal. However, as per the documents available and the submissions made, I find that there is no grievance reported to the Mediation Unit by the fourth named respondent.

[34]. The grievance that had been accepted by the Mediation Unit was made by the grievor to the Minister. As there is no grievance pertaining to the impugned decision reported by the 4th named respondent as per the notice of motion, the application for certiorari has to fail. The applicant too has conceded the fact as to who reported the grievance and submitted they were not pursuing with ground "C" of the notice of motion dated 10.4.12. The applicant has filed this application on a wrong assumption as to the party who reported the grievance which resulted in the impugned decision, for these reasons the declaratory relief sought too has to fail.

[35]. For the reasons stated above, I find the Mediation Unit has not exceeded its jurisdiction nor has the applicant being successful in convincing court that there is an error of law in accepting the grievance. In the given circumstance of this case the Mediation Unit has not acted outside the time period specified.

[36]. Accordingly, for the reasons set out above I am inclined to accept the submissions of the respondent opposing this application and the application has to fail.

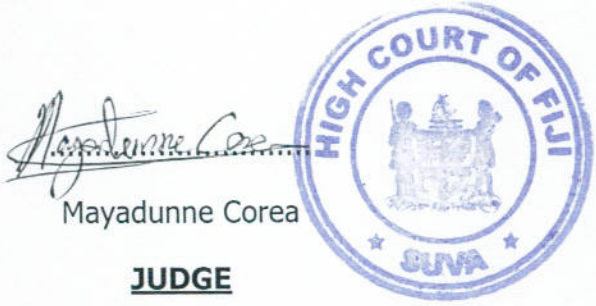
[37]. In my view the applicant has not been successful in convincing the court to obtain the relief prayed in the summons.

[38]. The 4th Respondent was not present before the Court and did not take part in these proceedings. Accordingly, as the applicants' application is not successful 1, 2, 3. Respondents are entitled to costs. I award a cost of $400 in favour of each respondent.

[39]. Accordingly, I make the following orders:

a) The application for Judicial Review and the declaratory orders are refused and the application dismissed.

b) 1, 2, 3 respondents are entitled to a cost of $400 each summarily assessed.



Mayadunne Corea

JUDGE

08.08.2014