IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CONSTITUTIONAL JURISDICTION

HBM Constitutional Redress Application No. 14 of 2017

BETWEEN : **VILIAME FINAU**

APPLICANT

AND : **HARE MANI**

FIRST RESPONDENT

AND : **RICHARD DONALDSON**

SECOND RESPONDENT

AND : **KAILESH KUMAR**

THIRD RESPONDENT

AND : **PAKEEZA MOHAMMED** and **FAIYAZ ALI**

FOURTH RESPONDENT

Written submissions (in support of Pre – objection) by Resp. on **18th May 2017**
Written Submission (in objections) by Applicant on: 26th **May 2017**
Written Submission (in reply) on: 14th **June 2017**

Counsels : Mr. K. Tunidau o/i of Kevueli Tunidau Lawyers for the Applicant.

Mr. C. Yee & Ms. M. Vanua instructed by Messer's.

Sherani & Co. Solicitors for 1st to 4th Respondents.

Ms. M. Faktaufon for the Attorney General.

Delivered on : **14th July, 2017**

Ruling by : Justice Mr. Mohamed Mackie

RULING

(On Preliminary Objections)

Introduction

1. This ruling is made in relation to a preliminary objection raised by the learned Counsel for the Respondents on 12th May 2017, when the notice of motion, dated and filed on 3rd May 2017, together with the Affidavit of the Applicant, for **CONSTITUTIONAL REDRESS**, was supported before me by the learned Counsel for the Applicant, seeking relief under Section 44(1) of the Constitution 2013 and the High Court (Constitutional Redress) Rules 2015.

2. The learned Counsel, who appeared for all 4 Respondents, raised a preliminary objection stating that the Applicant has Adequate Alternative Remedy elsewhere, which has not been exhausted, according to him, and thus, moved that this Application should be dismissed at the outset.

3. Accordingly, both the learned Counsels, having agreed to dispose the matter by way of written submissions, filed same as stated in the caption above.

Background (Brief Facts According to the Applicant)

4. For the purpose of lucidity, comprehension of the actual grievance of the Applicant and to avoid verbosity, I shall condense the averments of the Affidavit dated 3rd May, 2017 deposed by the Applicant, as follows.

5. The Applicant states that on the 19th Day of August, 2010, he was appointed as the CATERING SERVICES CONTROLLER with **Air Terminal Services (FIJI) Limited** (hereinafter referred to as "ATS") and was in service till he was stood down by the letter dated **16th February, 2017** pending an internal disciplinary inquiry against him and at the end of the, purported, inquiry his service was terminated by letters dated 26th&27th April, 2017.

6. All what the Applicant complaints through the rest of the averments in his Affidavit, is that his Constitutional right for him to be present at the said Disciplinary Inquiry with his lawyer, in order to legally defend him and to protect his fair trial and other rights connected thereto guaranteed under Sections 14 (2) (d), (h), (I) and 15(1), (4), & (5) (b) of the Constitution, were violated by the Respondents contravening the (Chapter 2- Bill of Rights) provisions of the Constitution of the Republic of Fiji 2013. Moreover, he alleges that his rights to be governed by the relevant provision in clause 26 A (iv) of the Master Agreement, has also been violated by the Respondents.

7. Accordingly, the Applicant in his Notice of Motion prayed ,inter- alia, for seven(7) different declarations as per paragraphs A to G thereof and for an Injunctive relief restraining the First and Second Respondents from taking any further actions on the decision of the Third and Fourth Respondent members of the Disciplinary Inquiry Committee , to terminate the Applicant until further Order of the Court and for a permanent stay of the termination. However, the learned Counsel for the Applicant did not press for the said injunctive relief when the matter was supported.

(Preliminary Objections)

8. The firm stance taken up by the learned Counsel for the Respondents, in his written submissions, was that that the Applicant has adequate alternative remedy under the **Employment Relations Act of 2007 (E. R. Act)** and through the internal Appeal procedure of ATS under Master Agreement and moved to dismiss the Application as provided for in subsection 44 (4) of the Constitution.

9. Attention of the Court has been drawn by the Respondent's Counsel to the relevant provisions of the Employment Relations Act (Formally known as Promulgation) of 2007, where the Adequate Alternative Remedy is said to be found and filed two documents, namely, Form ER-1 and ER-2- the Application preferred by the Applicant for Mediation and the Notice issued pursuant to it - to substantiate that the Applicant is already in the process of seeking his remedy at the appropriate forums in terms of the E. R. Act.

10. Learned Counsel who appeared from the Attorney General's Office, while endorsing the above submissions, stated that the Applicant has also not exhausted the Appeal process that follows the Internal Disciplinary Inquiry in terms of the Master Agreement, which is considered to be the Contract of employment between Employer "ATS" and **Federated Airline Staff**

Association (hereinafter referred to as "FASA"), the Union in which the Applicant, as an employee of ATS is, admittedly, a member.

11. Learned Counsel for the Respondents has also drawn the attention of the Court to Sections 211,220 & 221 of the Employment Relations Act of 2007, which set out the jurisdiction of the Employment Relations Tribunal (ERT) and Employment Relations Court (ERC) respectively and to Section 212 thereof, which speaks about the power of the Employment Relations Tribunal to order compliance, and states that, since the Applicant's claims are in relation to an Internal Disciplinary Inquiry proceedings, involving the Applicant and his Employer ATS, it would only be appropriate for this matter to be resolved using the provisions of Employment Relations Act of 2007.

12. Moreover, Counsel submits that on the said ER-1 Application for Mediation parties have already undergone the Mediation Process and subsequently his Employment Grievance has now been referred to the Employment Tribunal by issuing form -3. Presently, parties are said to be awaiting a date before ERT.

Reply Submission by the Applicant's Counsel

13. By giving a brief summary of the chain of events, the learned Counsel for the Applicant has addressed the Court under five (5) headings as follows, in order to counter the preliminary objection raised by the Respondent's Counsel, who vehemently avers that the Applicant has Adequate Alternative Remedy before the Employment Relations Tribunal and Employment Relations Court under the Employment Relation Act of 2007, in addition to the availability of the Internal Appellate right against the decision of the Disciplinary Inquiry Committee found in terms of the Master Agreement.

(a) Applicant's Employment Grievance pre-dismissal/termination

14. It is argued that at the time he made the Application for Mediation on **1st March, 2017,** setting out his Employment Grievances, his services had not been terminated; he was still an employee of the ATS; and his only Employment Grievance at that time was that he had been "Disadvantaged" in terms of Section 4 (a) and Discriminated in terms of 4(c) of the Employment Relation Act of 2007, in the following manner.

i. That he was stood down or suspended,

ii. He was disciplinarily charged without any basis,

iii. That he was discriminated against since he was a Trustee of ATS Employees Trust and

iv. That he was refused entry to the ATSET office located in ATS premises.

15. By the above argument, it is submitted that since the Application for Mediation was pertaining to his pre- dismissal period (prior to 1st March, 2017) he cannot obtain adequate relief from the Tribunal or Court for his present plight of dismissal

(b) Employment Grievance - Post dismissal/termination.

16. Under this heading, it is argued that the Applicant, now being dismissed, does not have an "employment grievance" within the meaning of the term as defined, against the Employer ATS, simply because the termination or dismissal of his employment was not by his Employer.

17. The reason adduced by the learned Counsel for the Applicant to justify the above position is that since his dismissal was, allegedly, caused by a Committee comprised of only the 3rd and 4th Respondents, being the remaining members of the committee, after the withdrawal of the representatives of FASA and the Worker, namely, **Mr. Manasa Ratuvili** and **Mr. Penijamini Vunisalevu** respectively, the remaining members of the Disciplinary Inquiry Committee , the 3rd and 4th respondents ,were *functus officio* and the determination by them to terminate the Applicant, when *functus,* was ultra-vires.

18. Accordingly, Counsel argues that since the termination was not by ATS as the Employer, but by the so-called defunct three committee members, ATS is not vicariously liable for the illegal termination and the Applicant cannot take out an employment grievance against ATS.

19. It is also argued that due to the reasons herein above, that an "Employment Grievance" under the provisions of the Employment Relation Act 2007, is inadequate as an alternative remedy for the Applicant, because the termination was not by a committee comprised under Article 26B of the Master Agreement.

(c) Appeal process - Not Applicable to the Applicant

20. It is submitted on behalf of the Applicant that the Section 110 (4) of the Employment Relation Act 2007 and the Internal Appeal system, provided by the Master Agreement, do not apply to the Applicant upon termination of his employment and it is only applicable when the Contract of Employment is still afoot. It is further stated that when the Applicant stands terminated and dismissed the Employment Contract between the Applicant and ATS too stands terminated and dismissed

(d) Constitutional Redress as the only option for Applicant.

21. It is argued that Article 26A of the Master Agreement is enforceable by the Applicant as a worker pursuant to section 164(1) of the Employment Relations Act 2007 in the exercise of his rights safeguarded by the Chapter 2-Bill of Rights under the Constitution, at the time he was charged with disciplinary offences and subjected to a Disciplinary Inquiry pursuant to the Master Agreement.It is further argued that his Constitutional rights as a disciplinarily accused person before the Committee set up pursuant to the Master Agreement, is also protected under the Bill of Rights provisions.

(e) Right of access to legal representation under Common law.

22. The last point of allegation is that the Applicant was denied legal representation and his legally retained Counsel was denied access to the disciplinary committee sittings venue by the 3rd and 4th Respondents. The said denial is a breach of Applicant's rights under section 14(2) and 15 in the Constitution, according to the Counsel.

Relevant Law

23. Section 44 of the Constitution sets out as follows.

> *44-(1) If a person considers that any of the provisions of this Chapter has been or is likely to be contravened in relation to him or her (or in case of a person who is detained, if another person considers that there has been, or is likely to be, a contravention in relation to the detained person), then the person (or the other person) may apply to the High Court for redress.*
>
> (2)-*The right to make application to the High Court under subsection (1) is without prejudice to any other action with respect of the matter that the person concerned may have.*
>
> *(4)- The High Court may exercise its discretion not to grant relief in relation to an application or referral made under this section if it considers that an adequate alternative remedy is available to the person concerned.*

24. The other piece of legislation to which the attention of the Court was drawn to by the Counsel for the Respondents is the **Employment Relation Act 2007,** which embodies 3 main dispute resolutions Mechanism, namely, Mediation, the Employment Relation Tribunal and the Employment Relations Court.

25. The important sections that mainly come in to play for the time being are:-

> Sec. 4- gives interpretation to the term "employment grievance"
>
> *Sec. 110 (4) says:- When an employment contract includes an internal appeal system it must not provide for appeal to the Tribunal or employment Court, and the internal appeal system must first be exhausted before any grievances is referred to the Mediation Services.*
>
> ***Sec. 112. If the worker brings an employment grievance in relation to one aspect of employment but during the determination of the grievance there is evidence of grievance in respect of another aspect of employment, the decision may also cover the other aspect, provided the employer is advised during the proceedings of such matter.*** *(Emphasis mine)*
>
> *Sec. 201 (1) where a matter is referred to the Mediation services, a notice shall be issued to all the parties to appear before the mediator at the place and time specified in the notice.*
>
> *Sec. 211 Jurisdiction of Tribunal*
>
> *Sec.212 Power to order compliance*
>
> *Sec. 220Jurisdiction of employment Relation Court.*

Analysis

26. The task before me, for the time being, is to adjudicate on the preliminary objections raised by the learned Counsels for the Respondents on the question of availability of the Adequate Alternative Remedy, which is alleged to have not yet been exhausted. Therefore, I shall not indulge in deciding the merits of the substantive matter.

27. The Respondent's claim, that the Applicant was found guilty and dismissed at the end of the inquiry, is seriously disputed by the Applicant on various, purported, grounds. The Respondents, throughout the proceedings, have maintained the position that the dismissal is subject to internal Appeal procedure in terms of Master Agreement, for which the Applicant is said to have made a timely Appeal. However, those purported grounds are not matters that should be considered by

this Court at the moment except for the, subsequently admitted, fact of making an Appeal in terms of Master Agreement.

28. It is, particularly, noteworthy to observe that the Applicant had not disclosed in his Affidavit regarding his making of an Appeal to the Internal Appeal Mechanism or about making an Application for Mediation under the Employment Relation Act 2007. It was only disclosed to this Court by the Respondents, by filing two documents namely: ER1 and ER2 forms; i.e. the Application for Mediation and the Notice of Mediation.

29. The facts, that the Applicant has already attended for Mediation and now the matter is pending before the Employment Tribunal are not disputed by the Applicant. This shows that the Applicant has deliberately withheld these facts and documents in order to suppress the truth that he is in the process of seeking relief under the Employment Relations Act of 2007, where he should, undoubtedly, agitate for remedy on account of his alleged employment grievances.

30. Nevertheless, it has to be borne in mind that his right to come before the High Court for Constitutional remedy is guaranteed under Section 44(1) of the Constitution and it is without prejudice to any other action with respect of the matter that he may have as enshrined in Section 44(2). However, this right is subject to Provision in Section 44(4), where the Court can exercise its discretionary power not to grant relief, if alternative adequate remedy is available.

31. In order to arrive at a most justifiable decision, I shall hereby deal with the counter arguments placed by the Learned Counsel for the Applicant in his reply written submissions dated 26th May 2017, as follows:

32. The Applicant has not denied or disputed the facts that he made an Application for Mediation on 1st March 2017, attended for its sessions on 28th March and 11th & 28th April, 2017 respectively. It is also not disputed that, presently his grievance stands referred to the Employment Relation Tribunal. Accordingly, parties are said to be awaiting a date before the Employment Relations Tribunal.

33. Instead, the Applicant's Counsel has taken up a stance, that by the time the Applicant made the impugned Application on 1st March 2017; he had not in fact been dismissed, but only been disadvantaged and discriminated, in terms of Section 4(b) & 4(c) of the Employment Relations Act of 2007, respectively.

Sections 4(b) and 4 (c) read as follows.

> Sec 4(b). The worker's employment, or one or more conditions of it, is or are affected to the worker's disadvantage by some unjustifiable action by the employer;
> Sec 4(c). The worker has been discriminated within the terms of part 9;

34. By the aforesaid argument, what the Counsel for the Applicant tries to demonstrate is that the institutions under Employment Relations Act 2007 cannot provide adequate remedy in relation to the Grievance of dismissal of the Applicant that took place after the filing of the Application for Mediation on 1st March, 2017. In other words, he says that adequate remedy cannot be obtained for a Grievance, which did not exist at the time the Application for Mediation was made.

35. The above argument does not hold water, in view of the provision made in Section 112 of the Employment Relations Act 2007. This section seems to have escaped the attention of the learned Counsel for the Applicant.

> *Sec 112 "If the worker brings an Employment Grievance in relation to one aspect of employment but during the determination of the Grievance there is evidence of Grievance in respect of another aspect of employment, the decision may also cover the other aspect, provided that the employer is advised during the proceedings of such matter."*

36. Learned Counsel for the Applicant seems to be in an attempt to take out the Applicant from the coverage or application of the Employment Relations Act 2007 on the, purported, ground that, the Applicant did not have any "Employment Grievances", particularly, the Grievance of dismissal, when the Application was made for Mediation.

37. The term "dismissal" stands clearly interpreted as an "Employment Grievance" in terms of Section 4 of the Employment Relations Act 2007. Although, the Applicant had not faced the Grievance of dismissal at the time he resorted to Mediation, according to him, he has had other forms of grievances, against ATS, of being disadvantaged and discriminated in terms of Section 4(b) and 4(c) of the Employment Relations Act 2007, as evidenced by his Application. That is why he made the Application naming the ATS as the Respondent and now he cannot take up the position that he does not have "Employment Grievances" against the ATS, in order to justify his Constitutional Redress Application to this Court.

38. Another point raised by the Counsel for the Applicant, under the sub heading (b) above, was that the Applicant does not have an "Employment Grievance " against

the ATS since his dismissal was not by his Employer ATS, but by the Third and Fourth Respondents, who were alleged to be defunct on the withdrawal of FASA and Worker representatives from the Disciplinary Inquiry panel on Account of the, alleged, partial role played by the Third Respondent, being Chairman of the Committee and the refusal of legal representation. This again need not be considered by this Court and should be presented to the appropriate forum, where the Applicant should continue to agitate for his remedy.

39. In paragraph 22 of the Applicant's written submissions, the learned Counsel has stated about the, purported, inadequacy of "Employment Grievances" and not about the inadequacy of "Alternative Remedy".

> **Paragraph- 22 " It is submitted, therefore, for the reason herein above, that an "Employment Grievance" under the provision of Employment Relations Act 2007, is inadequate as an alternative remedy for the Applicant because the termination of the Applicant's Employment Contract was not made by the Disciplinary Committee comprised under Article 26B of the Master Agreement..." (**Emphasis is mine)

40. What matters here is the adequacy of "Alternative Remedy", not the adequacy of "Grievance". Perhaps, the learned Counsel may be referring to the present plight (grievance) of the Applicant being dismissed, which he claims to be different from what he was having at the time of making Application for Mediation. However, I see that the provisions in Section 112 of the Employment Relations Act 2007, is sufficient enough to salvage the Applicant, from whatever the grievances he has, before the ERT or ERC, which are appropriate forums for his Adequate Alternative Remedy.

41. With the above findings, the question raised under the headings (a) and (b) above, stand answered. Therefore, it is clear that the Applicant is not barred from agitating his Grievance of subsequent dismissal, through his Application preferred for Mediation, which is now before the Tribunal, under Employment Relations Act 2007. Section 112 of the Act has provision to cover his present state of affairs (dismissal) as stated above.

42. The next argument placed by the Applicant's Counsel, was that the Internal Appeal procedure is not applicable to the Applicant. The fact that he has made an Appeal within 7 days, as provided for in the Master Agreement and as duly notified to him by the letters of termination dated 26th and 27th April 2017, marked as VF-18 and VF-19 respectively, remains unchallenged. Counsel for the Respondents, in his both written submissions, has clearly stated that the ATS has accepted the Appeal and

called for names of the representative member/s from the FASA and the worker for the Constitution of the Appellate Panel.

43. Though, the Applicant claims that his Appeal is abandoned and withdrawn, it has not been substantiated by filing any documentary evidence. Hence, the conclusion that can be, safely, arrived at is that his Appeal is yet to be exhausted and doors are still open for him to make use of the Appeal process at the ATS, regardless of whatever the outcome may be.

44. In addition to making the said Appeal, it is admitted that the Applicant, soon after the receipt of the stand down letters (VF- 3 and VF – 4), dated 16th and 22nd February 2017 respectively, and even before the commencement of his Disciplinary Inquiry, as notified by letter (VF-5) dated 1st March 2017, has proceeded to make the said Application for Mediation, under the Employment Relation Act of 2007, knowing very well that his remedy is within that Mechanism.

45. The reasons adduced by the learned Counsel for the Applicant, in paragraph 25 of his reply submissions, to justify his claim that the section 110(4) of the Employment Relations Act 2007, Article 26D of the Master Agreement and the Appeal procedure, do not apply to the Applicant, cannot be accepted.

46. The forth contention of the Applicant's Counsel is that the Constitutional Redress is the only available option for the Applicant, for which the answer should, invariably, be negative in the light of the following revelations.

47. Firstly, it is to be observed that in paragraph 7(b) and (c) of the letter dated 20th April 2017, marked as VF- 15 and written by the Applicant's Lawyer, addressing the Disciplinary Committee, it has been clearly stated and admitted in plain language about the availability of various forums for the Applicant to step in for his remedy, which he can't deny now as appropriate forums to adjudicate his purported grievances.

Paragraphs (b) & (c) of the letter read as follows.

> 7(b)".....**The second step is the Appeal to the Committee of Review established Pursuant to the Article 26E of the Master Agreement.** If you deny Mr. Finau his Constitutional rights at DI level, you have opened the can of worms for **subsequent litigation commencing with the Committee of Review".** (Emphasis is mine)

7(c) "There is nothing to stop any litigant in the proceeding to go by way of a Grievance to the Mediation Service under the Employment Relations Act 2007, then to the Employment Relations Tribunal, the Employment Relations Court, the Fiji Court of Appeal and the Supreme Court." (Emphasis is mine)

48. The above correspondence is a clear admission on behalf of the Applicant, that he should continue his struggle by making use of the Appellate right before the Committee of Review at ATS, and proceed further, if necessity arises, until he obtains his remedy.

49. When there is a prescribed (Tailor-Made) legal Mechanism for the resolution of a particular grievance or dispute, it should, firstly, be referred to and adjudicated before such forum designed for it, unless the necessity arises for intervention of a higher forum to exercise jurisdiction conferred on it.

50. Although, the Constitution makes provisions for Constitutional Redress before this Court, it is subject to the discretion of this Court and it is my considered view that this Court should not allow or encourage the litigants to by-pass or disregard the very forums, where the remedy lies and still open for adjudication of the matters complained of, to obtain the remedy what is justly due.

51. My observation above, precisely, suits the Applicant in this case, who is in an unsuccessful attempt to disregard and by-pass the Mechanism that is available to address and redress his grievances by awarding adequate remedy, provided he succeeds in that forum/s.

52. With regard to the last point of contest, advanced on behalf of the Applicant, namely, Right of access to legal representation under the Common law, this Court need not dwell on it, for the reason stated above.

53. I am richly assisted by the chain of enlightening Case law authorities in this Jurisdiction, that have guided our Courts in tilting the scale in the adjudication of similar matters, where most of them are found to have culminated in dismissal, in view of the availability of Alternative Remedies considered to be adequate.

(A) **Vatunitu vs iTaukei Land Transport Board [2016] FJHC 785; HBC 21.2016 (1st September, 2016)**

This was a Civil Action, where, during the proceedings an Application was made for the discovery of documents under Constitutional Redress Provisions, while the specific provisions for same were available under Order 24 of the High Court rule. Hon. Justice Amarathunga refused the same citing that the Order 24 of the High Court is an alternative remedy for discovery.

(B) **In Karunaratne vs State [2015] FJHC 849; HAM 150/2015(4 November, 2015)**

His Lordship Justice Madigan refused a Constitutional Redress Application for permanent stay by the High Court, when an adequate remedy was available to apply for stay in the Magistrate's Court.

(C) **In the Privy Council case of Harrikissoon vs A.G. Of Trinidad and Tobago [1979] 3 WLR 62,** Lord Diplock L. J said:

"The right to apply to the High Court under [the relevant section of] the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its vale will be diminished if it is allowed to be misused as a general substitute for the normal procedure for invoking judicial control of administrative action. In an originating application to the High Court under the relevant section, the mere allegation that a human right or fundamental freedom of the Applicant has been or is likely to be contravened is not itself sufficient to entitle the Applicant to invoke the jurisdiction of the Court under the sub section if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the Court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom".

It was also observed in the above case that
"The authorities are clear and consistent. A Constitutional Redress Application will not automatically succeed. It would be an abuse of process should this be regarded as an absolute path to redress. All other avenues must first be explored and exhausted".

(D) **In Aliyaz Ali vs State [2005] FJHC 501; HBM 0079.2004(29 August 2005),** Justice Jitendra Singh stated, among other things,

"The Applications under the Redress Rules are not a short cut or a system to by-pass existing mechanisms in law. Section 41 of the Constitution is not an Aladdin's cave which contains all the remedies for all the ills and the Redress Rules the magical words "open sesame" which are keys to those remedies".

54. In view of the above, this Court holds that the Applicant in this case has Adequate Alternative Remedy, for him to exhaust in order to address his grievances at the relevant forums stated in my ruling.

55. Thus, this Court, having upheld the preliminary objections advanced by the learned Counsels for the Respondents and acting under Section 44(4) of the Constitution, decides not to grant relief to the Applicant.

56 Accordingly, this Application stands dismissed.

57. Though, the Respondents are reasonably entitled for costs on account of expenses incurred, in staging their defence through the Counsels, even at the preliminary stage, I refrain from imposing costs against the Applicant, considering that such an order for costs would affect the possible amelioration of the Employer-Employee relationship at the forums they are to meet again and the surrounding circumstances of this Application.

HIGH COURT OF FIJI
LAUTOKA

.....
A.M.Mohammed Mackie
Judge

At Lautoka
14th July, 2017