

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 80 of 2015

BETWEEN : DR DREW ALLBRITTEN of 265 Waimanu Road, Suva, Visiting Professor at FNU,
Executive MBA.

PLAINTIFF

AND : THE UNIVERSITY OF THE SOUTH PACIFIC a statutory body established under
the University of the South Pacific Charter, Cap a 266 and with its registered address at
Laucala Campus, University of the South Pacific, Private Bag, Suva.

DEFENDANT

BEFORE: Master V. D. Sharma

COUNSEL: Mr. Devanesh Sharma - for the Plaintiff
Mr. John Apted - for the Defendant

Date of Ruling: 15th March, 2018

RULING

*[Application by the Defendant seeking an order to strike out the Plaintiff's
Statement of Claim pursuant to Order 18 Rule 18(1) of the High
Court Rules, 1988 and the Court's Inherent Jurisdiction]*

APPLICATION

1. This is the Defendant's Summons to Strike Out, and seeks the following orders:
 - (a) That the Statement of Claim be wholly struck out and the Action be dismissed.
 - (b) All proceedings herein be stayed pending the determination of this application.
 - (c) The Plaintiff pays the Defendant costs of this application and all incidental costs hereto.

ON THE GROUNDS THAT:

- (a) That the Statement of Claim:
 - (i) discloses no reasonable cause of action; or
 - (ii) is scandalous, frivolous or vexatious; or
 - (iii) may prejudice, embarrass or delay the fair trial of the action; or
 - (iv) is otherwise an abuse of the process of the Court.
2. The application is made pursuant to Order 18 Rule 18 (1) of the High Court Rules 1988 and under the inherent jurisdiction of this Court.
3. The Plaintiff opposed the Defendant's Striking out application.
4. The application was heard in terms of the oral and written submissions made in this proceeding by the Plaintiff and the Defendants.

THE LAW and PRACTICE

5. The law on striking out pleadings and endorsements is stipulated at Order 18 Rule 18 of the High Court Rules 1988 which states as follows-

18.-(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that-

- a) it discloses no reasonable cause of action or defence, as the case may be; or*
- (b) it is scandalous, frivolous or vexatious; or*
- (c) it may prejudice, embarrass or delay the fair trial of the action; or*
- (d) it is otherwise an abuse of the process of the court;*

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under paragraph (1) (a).

6. In Paulo Malo Radrodro vs Sione Hatu Tiakia & Others, HBS 204 of 2005, the Court stated that:

"The principles applicable to applications of this type have been considered by the Court on many occasions. Those principles include:

- a. *A reasonable cause of action means a cause of action with some chance of success when only the allegations and pleadings are considered - Lord Pearson in Drummond Jackson v British Medical Association [1970] WLR 688.*
- b. *Frivolous and vexation is said to mean cases which are obviously frivolous or vexations or obviously unsustainable - Lindley LJ in Attorney General of Duchy of Lancaster v L.N.W Ry [1892] 3 Ch 274 at 277.*
- d. *It is only in plain and obvious cases that recourse would be had to the summary process under this rule - Lindley MR in Hubbuck v Wilkinson [1899] Q.B. 86.*
- e. *The purpose of the Courts jurisdiction to strike out pleading is twofold. Firstly is to protect its own processes and scarce resources from being abused by hopeless cases. Second and equally importantly, it is to ensure that it is a matter of justice; defendants are permitted to defend the claim fairly and not subjected to the expense inconvenience in defending an unclear or hopeless case.*
- e. *"The first object of pleadings is to define and clarify with position the issues and questions which are in dispute between the parties and for determination by the Court. Fair and proper notice of the case an opponent is required to meet must be properly stated in the pleadings so that the opposing parties can bring evidence on the issues disclosed - ESSO Petroleum Company Limited v Southport Corporation [1956] A.C at 238" - James M Ah Koy v Native Land Trust Board & Others - Civil Action No. HBC 0546 of 2004.*
- f. *A dismissal of proceedings "often be required by the very essence of justice to be done"..... - Lord Blackburn in Metropolitan - Pooley [1885] 10 OPP Case 210 at 221- so as to prevent parties being harassed and put to expense by frivolous, vexations or hopeless allegation - Lorton LJ in Riches v Director of Public Prosecutions (1973) 1 WLR 1019 at 1027"*

STATEMENT OF CLAIM

7. The Plaintiff brings this claim against the Defendant on two (2) grounds-
- (i) *The First ground is that he was denied an extension of his Employment Contract by virtue of the Defendant's discrimination against him on the basis of his age and personal characteristics and circumstances.*
 - (ii) *The second ground is that he was not paid ll his lawful benefits at the time his Contract of Employment came to an end.*
8. The background facts as set out in the statement of claim establishes the factual basis on which the Plaintiff claims that he was discriminated against by the Defendant and the VC by virtue of :-
- (i) *The Defendant not adhering to its policy on renewals on contract for retiring academic staff.*

- (ii) *The Defendant differentially treating the Plaintiff's application for a new contract from all other applications and renewals of comparable or older staff at USP.*
 - (iii) *Misrepresentation being made to the Plaintiff about the reasons why his contract was not being extended.*
 - (iv) *The VC's undue influence on other members employed within the Defendant who had supported his bid for an extension of his Employment Contract.*
 - (v) *The VC's direct involvement in the written record of a meeting in which he was not present to ensure a particular outcome.*
 - (vi) *The fact that he is married to Professor Susan Kelly.*
9. The background facts also establish the benefits that were due to the Plaintiff but not paid to him.

STATEMENT OF DEFENCE

10. Save as to paragraph 2 of the statement of claim, it denies each and every other allegations of fact in the Claim as if the same were set out in full herein and specially traversed one by one in sequence.
 11. The Defendant says that the Plaintiff is not entitled to any of the relief sought in the Claim.
 12. The Defendant objected that the Claim discloses no cause of action, is scandalous or vexatious, may prejudice, embarrass or delay the fair trial of the action and is otherwise an abuse of the process of the court.
 13. The Defendant further says that the Claim does not contain sufficient particulars.
- It reserves —
- (a) the right to file an Amended Statement of Defence upon receipt of the further and better particulars requested by the Defendant's solicitors letter of 2 March 2015; and/or
 - (b) to apply to strike out the Claim and dismiss the Action.

ANALYSIS and DETERMINATION

14. There are Five (5) issues to be deliberated upon and determined by this Court-
 - (i) *Whether the Plaintiff's Claim discloses no cause of action;*
 - (ii) *Whether the Plaintiff's Statement of Claim is scandalous, frivolous and/or vexatious?*
 - (iii) *Whether the Statement of Claim will prejudice and embarrass a fair trial of the action?*
 - (iv) *Whether the Statement of Claim is otherwise an abuse of the process of the Court?*
 - (v) *Whether this Court has the Jurisdiction to hear this matter?*

15. It is well established that the jurisdiction to strike out claim or pleadings should be used very sparingly and only in exceptional cases: **Timber Resource Management Limited v. Minister for Information and Others** [2001] FJHC 219; HBC 212/2000 (25 July 2001).

16. In dealing with the issue of striking out of application, I bear in mind the following passage from **Halsbury's 4th Ed. Vol. 3 at para 435**:

"The power to strike out, stay or dismiss under the inherent jurisdiction is discretionary. It is a jurisdiction, which will be exercised with great circumspection and only where it is perfectly clear that the plea cannot succeed, it ought to be exercised sparingly and only in exceptional cases. However, for this purpose the court is entitled to inquire into all the circumstances of the case, and to this end affidavit evidence is admissible."

17. In the case of **Khan v Begum (2004) FJHC 430; HBC0153.2003L (30 June 2004)** Justice Connors discussed **18 (1)(a) and (d)** where he held that:

"It is said that the fact the court has this inherent jurisdiction is one of the characteristic which distinguishes the court from other institutions of the government. It is a jurisdiction, to be exercised summarily and as I have said, is in addition to the jurisdiction conferred by the rules. It is not in issue that if a party relies solely upon Order 18 rule 18 there no evidence may be considered by the court in making its determination but that limitation does not apply where the applicant relies upon the inherent jurisdiction of the court."

18. In **National MBF Finance (Fiji) Ltd v. Buli Civil Appeal No. 57 of 1998 (6 July 2000)** the Court stated as follows:-

"The Law with regard to striking out pleadings is not in dispute. Apart from truly exceptional cases the approach to such applications is to assume that the factual basis on which the allegations contained in the pleadings are raised will be proved. If a legal issue can be raised on the facts as pleaded then the Courts will not strike out a pleading and will certainly not do so on a contention that the facts cannot be proved unless the situation is so strong that judicial notice can be taken of the falsity of a factual contention. It follows that an application of this kind must be determined on the pleadings as they appear before the Court...."

Issue (i) Whether the Plaintiff's Writ of Summons and Statement of Claim discloses any reasonable cause of action?

19. The following notes to **Order 17 r19 of the Supreme Court Practice (UK) 1979 Vol. 1 or 18/19/11** on what is meant by the term 'a reasonable cause of action' sufficiently provides the answer to the applications.

".....A reasonable cause of action means a cause with some chance of success when only the allegations in the pleadings are considered (per Lord Pearson in Drummond Jackson v British Medical Association [1970] 1 WLR, 688; [1970] 1 All ER 1094 CA). So long as the statement of claim or the particulars (Davey v Bentinck [1893] 1 QB 185) disclose some cause of action, or raise some question fit to be decided by a Judge or a jury, the mere fact that the case is weak, and not likely to succeed is no ground for striking out (Moore v Lawson (1915) 31 TLR 418, CA.; Wenlock v Moloney [1965] 1 WLR 1238 1 W.L.R. 1238 [1965] 2 All ER 871, CA)...."

20. Reference is also made to Lindley M.R. in *Hubbuck & Sons, Ltd v Wilkinson, Heywood & Clark Limited* [1899] 1QB 86 at page 91 said:

".....summary procedure is only appropriate to cases which are plain and obvious, so that any master or judge can say at once that the statement of claim as it stands is insufficient, even if proved, to entitle the plaintiff to what he asks. The use of the expression "reasonable cause of action" in rule 4 shows that the summary procedure there introduced is only intended to be had recourse to in plain and obvious cases".

21. In this instant case, in summary, the Plaintiff's Substantive Claim is for Special Damages for salary payable and reimbursement of medical expenses, Unlawful discrimination and denial of further extension of his Employment of Contract, General Damages, Interest and Costs accordingly.
22. The Plaintiff has made allegations against the Defendant for "Unlawful Discrimination against him and denial of further extension of his Employment of Contract together with salary payable and reimbursement of medical expenses".
23. It is for the Plaintiff to establish that he has a Cause of Action in this case in terms of the facts and the Pleadings filed herein.
24. On the other hand, the Defendant must establish that the Plaintiff does not have a Cause of Action in this case. It is too early in the proceedings to decide *Prima Facie* that there is no cause of action within this proceeding before the Court.
25. The Striking out application of the Defendant is an interlocutory summary proceeding and is only appropriate to cases which are plain and obvious.
26. The allegations and/or claims made in terms of the substantive matter as set out hereinabove by the Plaintiff needs to be determined on witnesses and documentary evidence subjected to cross examination at a full hearing. Such allegations cannot be determined on the affidavit evidence alone since the entire evidence may not have been divulged in the affidavit filed herein.
27. Bearing in mind the facts of this case and the nature of the pleadings filed by the parties to the proceedings, this case cannot be classed as 'plain and obvious' in nature.
28. Therefore, it is too early at this stage of the proceedings for this Court to ascertain and determine whether there is a reasonable cause of action or not.

Issue (ii) Whether the Plaintiff's Writ of Summons & the Statement of Claim is Scandalous, Frivolous or Vexatious & Abuse of Process of the Court?

29. It is well established that jurisdiction to strike out claim or pleadings should be used very sparingly and only in exceptional cases: *Timber Resource Management Limited v. Minister for Information and Others* [2001] FJHC 219; HBC 212/2000 (25 July 2001).
30. In *National MBF Finance (Fiji) Ltd v. Buli* Civil Appeal No. 57 of 1998 (6 July 2000) the Court stated as follows:-

"The Law with regard to striking out pleadings is not in dispute. Apart from truly exceptional cases the approach to such applications is to assume that the factual basis on which the allegations contained in the pleadings are raised will be proved.

If a legal issue can be raised on the facts as pleaded then the Courts will not strike out a pleading and will certainly not do so on a contention that the facts cannot be proved unless the situation is so strong that judicial notice can be taken of the falsity of a factual contention. it follows that an application of this kind must be determined on the pleadings as they appear before the Court...."

31. Whether the claim is **Scandalous**? Reference is made to the Supreme Court Practice 1993 (White Book) Vol. 1 at paragraph 18/19/14 states as follows-

"The Court has a general jurisdiction to expunge scandalous matter in any record or proceedings (even in bills of costs, Re Miller (1884) 54 L.J.Ch. 205). As to scandal in affidavits, see O.41, r.6.'

Allegations of dishonesty and outrageous conduct, etc., are not scandalous, if relevant to the issue (Everett v. Prythergch (1841) 12 Sim. 363; Rubery v. Grant (1872) L.R. 13 Eq.443).

"The mere fact that these paragraphs state a scandalous fact does not make them scandalous" (per Brett L.J. in Millington v. Loring (1881) 6 Q.B.D. 190, p.196). But if degrading charges be made which are irrelevant, or if, though the charge be relevant, unnecessary details are given, the pleading becomes scandalous (Blake v. Albion Assurance Society (1876) 45 L.J.C.P. 663)."

32. Whether the nature and contents of the Plaintiff's Claim in terms of the Writ of Summons and the Statement of Claim tantamount to **scandalous** facts and are irrelevant and therefore makes the Plaintiff's Claim **Scandalous**?
33. The Plaintiff's Claim is yet to be put to the **Test in terms of the evidence** to be tendered at the hearing and then for the determination of the Claim.
34. Therefore, the Defendants cannot submit that the Plaintiff's Summons and the Statement of Claim at this stage of the proceedings is **scandalous in nature**.
35. The **issue** of whether the Plaintiff's Claim is **frivolous** or **vexatious**? Reference is made to paragraph 18/19/15 of the Supreme Court Practice 1993, Vol. 1 (White Book) which reads as follows:-

"By these words are meant cases which are obviously frivolous or vexatious or obviously unsustainable per Lindley LJ in Attorney General of Duchy of Lancaster v. L. & N.W.Ry [1892] 3 Ch. 274, 277; The Pleading must be "so clearly frivolous that to put it forward would be an abuse of the Court" (per Juene P. in Young v. Halloway [1895] P 87, p.90;"

36. **In Devi v. Lal [2014] FJHC 75; HBC 120.2008** (7th February, 2014) - It was held as follows-

"The Oxford Advanced Learners Dictionary of Current English 7th Edition defines the words "frivolous" and "vexatious" as:-

Frivolous: "having no useful or serious purpose"

Vexatious: "upsetting" or "annoying"

'Therefore, for a claim to be frivolous or vexatious, the Appellants must establish that the claim lacks merit (i.e. has no useful purpose) and is only to upset or annoy the Applicants'.

37. Taking into consideration the above matters together with the written submissions and oral arguments raised in Court by both Counsels, the Defendant needs to establish that the Plaintiff's Claim lacks merits. This Court needs to hear and determine the same in terms of the law and the evidence that the Parties to the proceedings may and or intend to produce at the hearing proper in order to allow this Court to deliberate and determine the substantive issues of alleged "Unlawful Discrimination against him and denial of further extension of his Employment of Contract together with salary payable and reimbursement of medical expenses", accordingly.
38. Therefore, this claim prima facie cannot be judged summarily to be frivolous or vexatious; it needs to be appropriately investigated, examined and determined in terms of the availability of evidence before a court of law accordingly.
39. Therefore, in the given circumstances, the Plaintiff's claim cannot be said to be frivolous or vexatious.

Issue (iii) - Whether the claim is otherwise an abuse of the process of the Court?

40. It is well settled that this Court has inherent jurisdiction to strike out the claim or pleadings for abuse of Court process and reference is made to paragraph 18/19/18 of the Supreme Court Practice 1993 Vol. 1,-

At paragraphs 18/19/17 and 18/19/18 of Supreme Court Practice 1993 (White Book) Vol 1 it is stated as follows:-

"Abuse of Process of the Court"- Para. (1) (d) confers upon the Court in express terms powers which the Court has hitherto exercised under its inherent jurisdiction where there appeared to be "an abuse of the process of the Court." This term connotes that the process of the Court must be used bona fide and properly and must not be abused. The Court will prevent the improper use of its machinery, and will, in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation (see Castro v. Murray (1875) 10 P. 59, per Bowen L.J. p.63). See also "Inherent jurisdiction," para.18/19/18."

"It is an abuse of the process of the Court and contrary to justice and public policy for a party to re-litigate the issue of fraud after the self-same issue has been tried and decided by the Irish Court (House of Spring Gardens Ltd. v. Waite [1990] 2 E.R. 990, C.A)."

"Inherent Jurisdiction - Apart from all rules and Orders and notwithstanding the addition of para.(1)(d) the Court has an inherent jurisdiction to stay all proceedings before it which are obviously frivolous or vexatious or an abuse of its process (see Reichel v. Magrath (1889) 14 App.Cas. 665). (para 18/19/18)

41. In Halsbury's Laws of England Vol 37 page 322 the phrase "abuse of process" is described as follows:

"An abuse of process of the court arises where its process is used, not in good faith and for proper purposes, but as a means of vexation or oppression or for ulterior purposes, or, more simply, where the process is misused. In such a case, even if the pleading or endorsement does not offend any of the other specified grounds for striking out, the facts may show it constitutes an abuse of the process of the court, and on this ground the court may be justified in striking out the whole pleading or endorsement or any offending part of it. Even where a party strictly complies with the literal terms of the rules of court, yet if he acts with an ulterior motive to the prejudice of the opposite party, he may be guilty of an abuse of process, and where subsequent events render what was originally a maintainable action one which becomes inevitably doomed to failure, the action may be dismissed as an abuse of the process of the court."

42. The phrase "abuse of process" is summarized in Walton v Gardiner (1993) 177 CLR 378 as follows:

"Abuse of process includes instituting or maintaining proceedings that will clearly fail proceedings unjustifiably oppressive or vexatious in relation to the defendant, and generally any process that gives rise to unfairness"

43. Again, the **summary procedure** should not be used to determine the "abuse of process of the court", rather the substantive matter needs to be heard to determine the issue within the writ and the statement of claim making a claim whether it is **groundless** and **unfounded** in the sense that the plaintiff does not know of any facts to support it.

44. Further reference is made to the case of Timoci Uluiwuda Bavadra v The Attorney General (Sup. Ct. (now High Court) C.A. No. 487 of 1987 where **Rooney J** said:

"I am not required to try any issues at this hearing. All I have to decide whether there is an issue to be tried. It is not enough for the defendant to show on this application that the plaintiff's case is weak and unlikely to succeed".

45. In Tawake v Barton Ltd [2010] FJHC 14; HBC 231 of 2008 (28 January 2010), Master Tuilevuka (as he was then) summarised the law in this area as follows:

"The jurisdiction to strike out proceedings under Order 18 Rule 18 is guardedly exercised in exceptional cases only where, on the pleaded facts, the plaintiff could not succeed as a matter of law. It is not exercised where legal questions of importance are raised and where the cause of action must be so clearly untenable that they cannot possibly succeed (see Attorney General -v- Shiu Prasad Halka 18 FLR 210 at 215, as per Justice Gould VP; see also New Zealand Court of Appeal decision in Attorney -v- Prince Gardner [1998] 1 NZLR 262 at 267."

Issue (iv) - Whether the Statement of Claim will prejudice, embarrass or delay the fair Trial of the action?

46. The action was filed by the Plaintiff on 04th February, 2015 wherein his Substantive Claim is for Special Damages for salary payable and reimbursement of medical expenses, Unlawful discrimination and denial of further extension of his Employment of Contract, General Damages, Interest and Costs accordingly.
47. The current application before this Court for determination is an Interlocutory Striking out Application filed by the Defendant. The substantive issues is yet to be heard and determined by this Court.
48. Further, matters of this nature cannot just be dealt with on affidavit evidence summarily to reach a just and fair decision. This Court needs to hear the evidence in its entirety and reach a just and fair determination accordingly. This Court is adamant in expediting this case and make appropriate further directions to ensure that the litigation is brought to its conclusion soon. Therefore, I do not find that the Defendant currently is and will until the final disposition of the substantive action in anyway whatsoever be prejudiced, embarrassed or that there will be any further delay in having a fair Trial of the action accordingly.
49. If the Defendant is mindful of the fact that the statement of claim has not been properly filed and or it has any short comings in terms of particularization of the claim, then the Plaintiff is at liberty to seek amendment to the Statement of Claim accordingly, unless the Defendant thinks otherwise.
50. I have noted upon the perusal of the file that the Plaintiff has already filed "Further and Better Particulars" on 09th October, 2015 and this would have been served to the Defendant.
51. Having perused and analyzed the issues raised by the Defendant couple with the principles dealing with the present application to Strike out the Plaintiff's Writ of Summons and the Statement of Claim, this court does not possess all the requisite material and evidence to reach a definite and certain conclusion to strike out the Plaintiff's Claim as sought for, since the evidence remains untested.
52. Therefore, to determine the aforesaid issues raised herein, investigation and examination of the appropriate witnesses in terms of evidence are of a paramount requirement to reach a just and fair decision in the circumstances.

Issue (v) - Whether Court has Jurisdiction to hear this case?

53. According to the Plaintiff, the Defendant says that the High Court has no jurisdiction to hear this matter purely because this matter ought to have been submitted to the visitor. The Plaintiff opposes this application and submitted that this application is without merit and also unfair. He explains that it is unfair because the Defendant did not see it fit to inform the Plaintiff in his Contract that he had a right of appeal to the visitor. He added the Defendant is not really attacking the cause of action but rather the jurisdiction.
54. The Defendant's contention is that the Plaintiff's claims fall within the exclusive jurisdiction of USP's visitor and are therefore, outside the court's original jurisdiction.

55. Further or alternatively, to the extent that the Plaintiff's discrimination claims are based on the ERA and might fall outside the visitor's jurisdiction (which is denied), they would be within the exclusive jurisdiction of the ERT or the ERC and are therefore, are outside the Court's jurisdiction.
56. The question of Jurisdiction as to the Court in which this case should be filed. I find that the *ERP (Employment Relations Promulgation)* does not preclude the grievors and/or aggrieved party from bringing a common law claim in employment law.

The *ERC* is a division of the High Court and it hears matters under *section 220 of the ERP*. *Section 220* does not rest in the *ERC* exclusive jurisdiction to hear employment disputes.

The Defendant's action of filing a **striking out application** is asking the Master to **exercise jurisdiction**. If strict arguments are to apply, then surely even this case should not be brought before Master as the *ERP* does not rest in the Master's powers and/or Jurisdiction to deal with *ERC* cases.

57. Overall, I therefore in the above circumstances find that there are both triable issues as well as legal issues that needs to be investigated and determined in terms of the availability of the evidence before the Court at the trial proper.
58. In summary, the **Defendant's application seeking the striking out of the Plaintiff's claim** on the following **grounds fails** respectively.
- No cause of action;
 - Scandalous, frivolous and vexatious claim;
 - Prejudice, embarrass or delay the fair trial of the action; and
 - Question of Jurisdiction.
59. Further, considering the nature of the Plaintiff's substantive action, this is not the most appropriate stage of proceedings to determine the success of its claim.
60. Taking into consideration **oral arguments** and **written submissions** from both parties and bearing in mind the **substantive nature of the claim**, this court is inclined to grant **reasonable costs** to the Plaintiff **summarily assessed** at Court's discretion in the sum of **\$1000**.
61. In **Conclusion**, following are the **final orders** of this court-

FINAL ORDERS

- (i) That the Defendant's Summons seeking the Striking Out of the Plaintiff's Writ of Summons and the Statement of Claim is hereby dismissed.
- (ii) That the Defendant to pay the Plaintiff summarily assessed costs of \$1000 of this application within 14 days.

- (iii) The Matter to take its normal cause in terms of the substantive action.
- (iv) Further directions to be made on 15th March, 2018.

Dated at Suva this 15th day of March, 2018



MR VISHWA DATT SHARMA
Master of High Court, Suva

cc: R. Patel Lawyers, Suva.
Munro Leys Solicitors, Suva.