

IN HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No.: HBC 42 of 2016

BETWEEN : **THOMAS PAUL** of MQ 37, University of the South Pacific, Staff
Campus, Laucala Bay Road, Suva

PLAINTIFF

AND : **ARVIND PATEL C/O -THE UNIVERSITY OF THE SOUTH**
PACIFIC a duly incorporated body constituted under the University of
the South Pacific Act Cap 266 and having its institution at Laucala Bay
Road, Suva, Fiji.

FIRST DEFENDANT

AND : **THE UNIVERSITY OF THE SOUTH PACIFIC** a duly incorporated
body constituted under the University of the South Pacific Act Cap 266
and having its institution at Laucala Bay Road, Suva, Fiji.

SECOND DEFENDANT

Counsel : **Plaintiff: Mr. Diven Prasad**
Defendant: Mr. John Apted

Date of Judgment : **27.11.2019**

JUDGMENT

INTRODUCTION

1. Plaintiff was an employee of second Defendant. First Defendant was the head of the school where Plaintiff was a professor. He instituted this action while he was employed with second Defendant alleging discrimination in not conducting performance evaluations in terms of second Defendant's own policies on reviewing. Apart from that, statement of claim contained particulars of negligence, based on failure to follow second Defendant's Policy on staff performance, failure on the part of staff review committee. These are all allegations regarding noncompliance of internal policies and procedures of Second Defendant. Plaintiff is also alleging loss of reputation for removal of Plaintiff from teaching, Plaintiff's contract of service as a

professor was extended till he reached the age of retirement, but this action was instituted before expiration of that time period. All the allegations contained in the statement of claim are having sufficient *domesticity* including defamation as alleged negligence and dispute arose from actions governed by internal rules. Second defendant's Charter and internal rules and procedures allows a visitor to adjudicate a dispute with its staff. This is an exclusive jurisdiction in terms of Court of Appeal decision in *Muma v University of the South Pacific* [1991] 37 FLR 101. Defendants files summons for strike out statement of claim, before Master and this was not garneted. This is an appeal from that ruling. All the allegations contained in the statement of claim are based on internal rules, hence within exclusive visitatorial jurisdiction. Statement of claim is struck off. Appeal allowed. Since Appeal was decided on jurisdiction other grounds of appeal are not considered.

FACTS

2. The Plaintiff was employed as a professor with second Defendant from 2.2.2012 to 26.7.2016 in terms of an employment contract.
3. The contract of employment was made under its powers conferred by the Charter and Statutes and stated

"The offer is subject to the provisions of the Charter and Statutes of the University, The University of the South Pacific Staff Ordinance (2009), Ordinance for the Discipline of Academic and Comparable Staff and the Intellectual Property and Copyright Policy of the University".
4. While employed, Plaintiff was attached to a school of second Defendant, where first Defendant was its head. So Plaintiff's line of reporting was through first Defendant
5. Second Defendant paid academic staff an inducement allowance depending on circumstances. Such allowances were governed by a policy called the Inducement Allowance Policy (Policy No. 5.9.12). This is part of Policies and Procedures of Second Defendant.
6. On 11.9.2015, second Defendant offered the Plaintiff a renewal without the inducement allowance and, the Plaintiff accepted it without reservation on 2.10.2015.
7. Plaintiff was informed of extension of his term up to 26.7.2016, until he reached his age of retirement. This was communicated on 21.5.2015.
8. On 4.11.2015 first Defendant wrote a letter copied to Dean, DVC, and to a person named in HR, where Plaintiff was accused of repeating same questions and also discussing solution and marking guides prior to exam. Based on that Plaintiff was removed from teaching.

9. There was no reply to this letter by Plaintiff.
10. Plaintiff was not assigned any teaching assignments thereafter till his contract expired on 16.7.2016. His position remained professor of the school he was attached and he received remuneration stated in the employment contract.
11. Plaintiff was granted inducement allowance 25.7.2014, but this was withdrawn on 28.8.2015.
12. On 22.2.2016, the Plaintiff filed his writ and Claim, making several claims regarding alleged breaches of second Defendant's policies in relation to the inducement allowance and Professor Patel's actions on the examination issue. The Claim also purported to plead common law negligence and defamation claims in respect of the examination issue.
13. Counsel for the Defendants filed summons for strike out on 21.6.2016 before Master and Master had refused strike out in his ruling handed down on 24.4.2016.
14. Defendants sought leave to appeal against said ruling, and leave was granted on 2.7.2018 considering Court of Appeal decision of *Muma V University of South Pacific* [1991] 37 FLR 101 as the strike out was based on jurisdiction of the court. Court of Appeal in the said case held visitatorial jurisdiction is exclusive and affirmed strike out of claim that fell within jurisdiction of visitor.
15. Plaintiff filed notice of appeal and grounds of appeal. The first ground of appeal is jurisdiction of the court to determine this action in the light of exclusive, visitatorial jurisdiction.
16. First courts need to determine claims in the statement of claim are within visitor's jurisdiction and if so such claims are not justiciable by courts.

ANALYSIS

17. Plaintiff in the statement of claim admitted that his terms of employment entered on 27.7.2011, was subject to provisions contained in the Charter, Statutes and Ordinances of second Defendant including Staff Ordinance, 2009.
18. He also admit that he was appointed as a professor to the Faculty of Business and Economics. First Defendant was the head of school where Plaintiff reported to Dean of the faculty through him.
19. Apart from remuneration contained in the contract of employment, on 25.7.2014 Plaintiff was granted inducement allowance of thirty percent on his salary. This was given in recognition of demand and skills.

20. On 28.8.2015 Plaintiff was informed that inducement allowance would not be paid. Upon inquiry he was informed that said decision was in terms of his performance evaluation. These are internal evaluation procedure of academic staff.
21. Plaintiff alleged that he was not properly evaluated by list Defendant due to bias, and the alleged bias was, not following internal procedure, hence discrimination. Plaintiff also stated that Defendants had failed to comply with the staff review procedure.
22. So the dispute regarding non-payment of inducement which was an additional payment made due to '*demand and skill*' commenced on 25.7.2014 was a domestic matter that needs to be resolved considering internal statutes, ordinances and procedures.
23. This inducement was not paid after 28.8.2015 and Plaintiff should have sought resolution of that through internal procedures exclusive jurisdiction of visitor within stipulated time period contained in Ordinance Governing the Term of Office and Duties of the Visitor, which was made in terms of its Charter and Statues. There is no dispute as to the applicability of the said Ordinance to Plaintiff. In the statement of claim there is no averment to the effect those are not applicable.
24. Said Ordinance in clauses 9 to 15 laid the procedure including time period to bring a matter before visitor. Clause 11 specifically states that any dispute should be brought within three calendar months from the date member become aware of the issue for the first time.
25. So, if visitor has jurisdiction to deal with all and or any of the claims stated in the statement of claim they needs to be struck off as visitatorial jurisdiction is exclusive.
26. Jurisdiction of visitor was succinctly dealt in following paragraph in the judgment of *Patel v University of Bradford Senate* [1978] 3 All ER 841,¹ at page846

'Before I examine whether the matters in dispute before me are matters of the type which fall within the visitor's jurisdiction, I think that I should consider whether that jurisdiction is exclusive. On the authorities it seems to be clear that the visitor has a sole and exclusive jurisdiction, and that the courts have no jurisdiction over matters within the visitor's jurisdiction. In consequence, any proceedings in the courts which seek the determination of those matters will be struck out for want of jurisdiction. The visitor is not free from all control by the courts. Thus prohibition will lie to restrain him from exceeding his jurisdiction, and so will mandamus if he refuses to exercise it. But the courts will not adjudicate in matters which lie within his jurisdiction.'
(emphasis added).

¹ Affirmed UK Court of Appeal in [1979] 2 All ER 582

27. There is no concurrent jurisdiction among court and visitor, as the two are mutually exclusive and only subject to judicial review. In *Thomas v University of Bradford* [1987] 1 All ER 834 UK House of Lords held, (Per Lord Griffiths).

*My Lords in my opinion the exclusivity of the jurisdiction of the visitor is in English law beyond doubt and established by an unbroken line of authority spanning the last three centuries from *Philips v Bury* (1694) Skin 447, [1558-1774] All ER Rep 53 to *Hines v Birkbeck College* [1985] 3 All ER 156, [1986] Ch 524*

28. The fact that Plaintiff was under an employment contract is not a reason to deny visitatorial jurisdiction.

29. *Re Wislang's Application* [1984] NI 63 held,

*'But what the authorities show, as I read them, is that matters may well be in breach of a contract of employment, yet within visitatorial jurisdiction, if those matters are of an **internal domestic character** or touch upon the interpretation or execution of private rules and regulations of the university.'*²(emphasis added)

30. So, what is important in determining jurisdiction of visitor is not whether employment was under contract or whether pleaded as tort, but whether dispute is internal domestic character. This can be determined from how the dispute had arisen and what methods are available internally. If the dispute is having 'domesticity' it should be determined exclusively by visitor.

31. In *Thomas v University of Bradford* [1987] 1 All ER 834 UK House of Lords considered what can be considered as 'domesticity' for inclusion of visitatorial jurisdiction and held. .

'This then leads me to consider what is meant by the reference in the cases to the 'domesticity' of the visitatorial jurisdiction. The word is clearly not used with the width of its everyday meaning. Nothing could be more domestic in its everyday sense than the arrangements in the kitchens or for the cleaning of the premises, but no one suggests that the domestic staff of a university fall within the visitatorial jurisdiction. I am satisfied that in referring to the domestic jurisdiction the judges are using a shortened form of reference to those matters which are governed by the internal laws of the foundation. This will include not only the interpretation and enforcement of the laws themselves but those internal powers and discretions that derive from the internal laws such as the discretion necessarily bestowed on those in authority in the exercise of their disciplinary functions over members of the foundation. It is only if

² Cited by Lord Griffiths in [1987] 1 All ER 834 [1987] 1 All ER 834 at 844

'domesticity' is understood in this sense that any principle emerges that can be of general application to determine whether or not a given matter falls within the visitatorial jurisdiction. What is not permissible is to regard 'domesticity' as an elastic term giving the courts freedom to choose which disputes it will entertain and which it will send to the visitor. This approach necessarily involves the concept of a concurrent jurisdiction and, as I have endeavoured to show, this is not the way in which our law has developed.

I would adopt the following passage from Dr Smith's latest article 'Visitation of the Universities: A Ghost from the Past' (1986) 136 NLJ at 568:

'Once it is recognised that the supervision of the statutes, ordinances, regulations etc of the foundation is the basis of the visitatorial jurisdiction, then it becomes a relatively simple matter to define the scope of the visitor's powers, for any matter concerning the application or the interpretation of those internal laws is within his jurisdiction, but questions concerning rights and duties derived otherwise than from such internal laws are beyond his authority. Thus a matter or dispute is "domestic" so as to be within the visitatorial jurisdiction if it involves questions relating to the internal laws of the foundation of which he is visitor or rights and duties derived from such internal laws. Conversely, an issue which turns on the enforcement of or adjudication on terms entered into between an individual and his employer, notwithstanding that they may also be in the relationship of member and corporation, and which involves no enforcement of or adjudication concerning the domestic laws of the foundation, is ultra vires the visitor's authority and is cognizable in a court of law or equity (see "The Exclusive Jurisdiction of the University Visitor" (1981) 97 LQR 610 at 644).' (emphasis added)

Lord Griffiths further held.

"In the present case, the entire dispute is centered on the statute, ordinances and regulations of the university. Were they correctly applied and were they fairly administered? Such a dispute in my view falls within the jurisdiction of the visitor and not the courts of law, notwithstanding that its resolution will affect Miss Thomas's contract of employment."

32. Since statement of claim relies on Staff Review Procedure regarding the issue of bias or discrimination it is a dispute which was domestic dispute within visitatorial jurisdiction.
33. Plaintiff in the statement of claim alleges that first Defendant wrote to him stating that exam papers for Course FM 201, FM 301 were not prepared with due care and questions were almost same. According to Plaintiff, these are academic misconduct and again within visitatorial jurisdiction. Such an act needs to be examined with rules and procedures, which are internal.

34. In the statement of claim Plaintiff alleges his reputation was damaged by first Defendant through imputations and they are:

- a. *"The Plaintiff's teaching qualities have led to damaging the reputation of Finance courses taught at the School.*
- b. *That the Plaintiff discussed exam questions with students prior to exams.*
- c. *That the Plaintiff copied past years exam questions and now the school is getting bad reputation.*
- d. *That under the Plaintiff, the school is not performing hence the University's reputation is being spilled.*
- e. *That the Plaintiff is unfit to lecture in Finance and is not capable of teaching*
- f. *That the plaintiff is unfit to lecture in Finance and not capable of teaching*
- g. *That the Plaintiff does not deserve any inducement allowance as he is unfit to teach*
- h. *That the Plaintiff is incompetent to set exam papers in Finance."*

35. Statement of claim in paragraph 22 alleges that the above imputations are defamatory to Plaintiff being an academic and professor of Finance. This allegation of defamation will not exclude jurisdiction of visitor.

36. Though defamation is alleged, all the alleged imputations are internal and domestic in nature. It is not how a claim is drafted that determine visitatorial jurisdiction. What is important in visitatorial jurisdiction is source of dispute between the parties and alleged breaches which are internal.

37. Lord Griffiths also held *Thomas v University of Bradford* [1987] 1 All ER 834 at p 848.

"I have already pointed out that almost any dispute between a member and the university can be framed in either contract or tort, which relationships are apart from the visitatorial jurisdiction governed by the common law. To adopt this approach would entirely emasculate the visitatorial jurisdiction leaving it with virtually no content."

38. So that nature of framing of claim is not the determinant factor to determine jurisdiction, of visitor. Lord Ackner in his concurring judgment in *Thomas v University of Bradford* [1987] 1 All ER 834 at 852-3 held,

"The source of the obligation on which Miss Thomas relies for her claim is the domestic laws of the university, its statutes and its ordinances. It is her case that the university has failed either in the proper interpretation of its statutes or in their proper application. Miss Thomas is not relying on a contractual obligation other than an obligation by the university to comply with its own domestic laws. Accordingly, in my judgment, her claim falls

within the exclusive jurisdiction of the visitor, subject always to judicial review.

As regards the visitor's jurisdiction to award 'damages' I see no practical problem. The visitor in the course of his supervisory jurisdiction must be entitled, in order to ensure that the domestic law is properly applied, to redress any grievance that has resulted from the misapplication of that domestic law. Such redress may involve ordering the payment of arrears of salary in the case in which the visitor decides that the employment has not been determined, or compensation where the complainant has accepted the wrongful repudiation of his contract of employment. It has not been submitted to your Lordships that where such an order is made, there would be any realistic risk of the university failing to comply with the order."(emphasis is mine)

39. So a claim for damages based on alleged defamation and or claim based on contract of employment and the manner, in which such claim is framed, cannot and should not exclude jurisdiction of visitor. If that is not so it is easy to avoid visitatorial jurisdiction by combining any dispute that is justiciable by visitor with a claim for declaration, damages and defamation or breach of contract or similar tort. This will defeat the purpose of visitatorial jurisdiction.
40. Plaintiff's claim for negligence as pleaded in the paragraph 28 of statement of defence particularized as
- a. *"Failed to follow University Policy and staff performance*
 - b. *Failed to call staff review committee and allow Plaintiff to put his side of views on his work with the University.*
 - c. *Failed to ask Plaintiff to respond to allegations of gross misconduct as leveled by the First Defendant*
 - d. *Failed to act diligently, unbiased and fairly towards the Plaintiff and*
 - e. *Failed to observe that school of finance was not affected in any way and students are given professional and competent teaching."*
41. The above particulars of negligence are within visitatorial jurisdiction being domestic in nature and the alleged dispute arose from evaluation of performance which was an internally regulated.
42. Visitor's jurisdiction is exclusive in terms of Court of Appeal decision *Muma v University of the South Pacific* [1991] 37 FLR 101. This is due to specialized nature of a university and disputes with its staff and students. Applicable internal rules and procedure and speedy confidential resolution through such a system should not be undermined through drafting and application of common law. Present visitor is an appellate judge of neighboring country. This is to allow exclusive visitatorial

jurisdiction exercised through competent person with sufficient legal knowledge. Having failed to raise the dispute with the visitor in terms of procedure laid, Plaintiff cannot seek redress from court. Only way court can deal is through judicial review, once the visitor had dealt with the issue.

43. Lord Griffiths in *Thomas (Supra)* held .

"I prefer the view expressed by Burt C.J. I can see no reason why the visitor as judge of the laws of the foundation should not have the power to right a wrong done to a member or office holder in the foundation by the misapplication of those laws. The visitor would be a poor sort of judge if he did not possess such powers."

*These considerations lead me to the conclusion that the visitatorial jurisdiction subject to which all our modern universities have been founded is **not an ancient anachronism** which should now be severely curtailed, if not discarded. **If confined to its proper limits, namely the laws of the foundation and matters deriving therefrom, it provides a practical and expeditious means of resolving disputes which it is in the interests of the universities and their members to preserve.**"(emphasis added)*

44. In Fiji dispute resolution through specialized tribunals is not a strange phenomenon. There is need to resolve disputes without delay. Visitor can resolve disputes efficiently. Visitor of Defendant is currently held by a judge of an appellate court of another country. Visitatorial jurisdiction is mutually exclusive with the jurisdiction of court in terms of Court of Appeal decision in *Muma v University of the South Pacific* held,

"Accordingly, we are satisfied that the learned judge was right when he ruled that the appellant could not come to a Court to seek the declarations which he was seeking in his Statement of Claim. As a member of the University he could have taken to the Visitor his complaint about the matters raised in paragraphs 4 to 11 of his Statement of Claim; they were, therefore, not justiciable in a court."

CONCLUSION

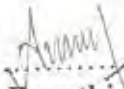
45. Allegations contained in the statement of claim are all domestic and not justiciable by courts. Plaintiff having failed to follow internal procedure to resolve dispute cannot seek redress from court unless through judicial review of visitor's decision. Since I have held that matter is not justiciable by courts, there is no need to determine other appeal grounds. Master's decision 24.4.2018 is set aside. Appeal is allowed. Cost is summarily assessed at \$3,000 to be paid within 21 days.

FINAL ORDERS

- a. Master's Ruling of 24.4.2018 is set aside.
- b. Statement of claim is struck off.
- c. Appeal allowed.
- d. Cost of this appeal summarily assessed at \$3,000.

Dated at Suva this 27th day of November, 2019.




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Justice Deepthi Amaratunga
High Court, Suva