

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No.: HBC 29 of 2016

BETWEEN : **SATYA PAUL** of MQ 35, University of the South Pacific, Staff Campus,
Laucala Beach Estate

PLAINTIFF

AND : **FRANCO GANDOLFI 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 in Fiji.

FIRST DEFENDANT

AND : **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 in Fiji.

SECOND DEFENDANT

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

Date of Judgment : **27.11.2019**

JUDGMENT

INTRODUCTION

1. Plaintiff was employed by second Defendant as head of school. First Defendant was Dean of faculty under which the school where Plaintiff was the head.
2. The Charter and Statutes empower Second Defendant's Council to appoint a Visitor whose function is to determine disputes between "the University and any member of state or the University and any student."

3. Article 27 of Second Defendant's Charter says -

"The Council may by simple majority approve the appointment of a Visitor of the University for such period and with such duties as the Council determines. The Visitor's decision on matters within his or her jurisdiction shall be final."

4. Statute 10 provides -

*"(1) The Council shall appoint a University Visitor who shall have **jurisdiction to determine any disputes between the University and any member of staff, or the University and any student** provided always that internal avenues for resolution of disputes have been exhausted.*

(2) The term of office and duties of the Visitor shall be determined by the Council and set Out in an Ordinance" (emphasis added)

5. The Council has made an ordinance to govern the Visitor's exercise of his jurisdiction called an "Ordinance Governing the Term of Office and Duties of the Visitor."

6. Section 3 of the Visitor's Ordinance defines the Visitor's jurisdiction in the following way -

*"3. Subject to the Charter and the Statutes of the University, and this Ordinance, **the Visitor is to determine any dispute which is referred to the Visitor under this Ordinance, or the Ordinance for the Discipline of Academic and Comparable Staff or the Ordinance for the Discipline of Students.**" (emphasis added)*

7. Section 1 of the Ordinance defines the a "dispute" as follows -

*"Dispute" means a dispute between the **University and any member of staff** or a dispute between the University and any student and **includes an appeal** (emphasis added)*

8. The Visitor's jurisdiction is therefore widely defined inclusively any dispute between a staff member and USP in addition to appeals.

FACTS

9. The Plaintiff was employed as a professor of Economics attached to second Defendant's School of Economics from 1.7. 2014 to 30.6.2016.

10. The School of Economics is part of second Defendant's Faculty of Business and Economics and first Defendant was the Dean of this Faculty relevant time.

11. On 17.6.2015, first Defendant, gave the Plaintiff a petition dated 7.4.2015 signed by thirteen teaching staff in the School of Economics against the Plaintiff seeking his removal.
12. On 23.6.2015 Plaintiff replied to said petition.
13. First Defendant requested the Plaintiff to step down. When the Plaintiff did not cooperate with the request to step down he was removed from head of School but he remained teaching.
14. Plaintiff allege that said removal was without Staff Review Committee report to investigate the allegations contained in the petition. by staff members and more specifically performance of Plaintiff.
15. Plaintiff alleges that he had on 4.11.2015 submitted a letter to vice chancellor confirming that fourteen of the staff had supported him as head of School of second Defendant. This was also informed to first Defendant.
16. In statement of claim at paragraph 7 Plaintiff refers to clause 7(vi) of letter of appointment which stated that performance would be assessed annually, under the current staff review procedures.

ANALYSIS

17. Court of Appeal in Muma v University of the South Pacific [1991] 37 FLR 101, held
*'that without first adjudicating the dispute by the visitor, it is not justiciable for the courts to entertain matters within the jurisdiction of visitor'*¹
18. So in order to determine jurisdiction, statement claim needs to be examined and from facts stated therein decide whether dispute is internal, or 'domestic'.
19. Jurisdiction of visitor was succinctly dealt in following paragraph in the judgment of Patel v University of Bradford Senate [1978] 3 All ER 841,² 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

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

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).

20. 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*

21. If dispute falls within jurisdiction of visitor courts are excluded from determination, except by way of judicial review. This is expressly stated in Ordinance Governing the Term of Office and Duties of the Visitor. This was made in terms of Article 27 of the Charter of the second Defendant and also Statute 10.

22. *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).*

23. Plaintiff's claim rests on failure to call a Staff Review Committee regarding petition made by thirteen academic staff of the School where Plaintiff was the head.

24. The Plaintiff's claim against both Defendants made at paragraph 12 as follows -

"THAT the Defendants did not call for Staff Review Committee or any other enquiry committee to investigate the performance issue of the Plaintiff nor did they call the 13 petitioning staff to provide evidence of the Plaintiff's work ethics and his performance as Head of School or his behaviour with other teaching staff."

25. 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 referred to visitor.

26. The Plaintiff's allegations against the Defendants as pleaded in paragraph 12 of statement claim are that they did not call a Staff Review or other committee to

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

investigate the Plaintiffs performance, work ethics and behaviour with staff nor give him a fair hearing before removing him from his office as Head of School. Performance review, and then Staff Review and other committees are provided for under internal rules. It is apparent that the Plaintiffs allegation is that internal rules have not been followed before the exercise of an internal discretion regarding his performance.

27. Statement of claim further described his removal as head of the School and in paragraph 15 of the statement of claim states inter alia that '*Staff Review Procedures and breached clause 7(vi) of the Letter of Engagement.*'
28. Alleged loss of reputation sourced from the said breach of staff review procedure and internal communications, by First Defendant as Dean of Faculty exercising official acts.
29. Alleged loss of reputation was particularised in paragraph 18 of the statement of claim states
 - a. *"The Plaintiff's administration qualities have led to the School of Economics not working properly.*
 - b. *That under the Plaintiff's leadership, there was no research conducted in the said school.*
 - c. *That under the Plaintiff's leadership, the school is getting bad reputation.*
 - d. *That under the Plaintiff's leadership, the school is not performing hence the University's reputation is being spoiled."*
30. The allegation of reputational damage was a result of what was stated in paragraph 17 of statement of claim, which refers to internal review procedure and alleged unfairness. According to Plaintiff imputation was due to he being an academic and professor of Economics. These post he held and how he was removed as head of the school are domestic matters that involve internal rules.
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 '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. Plaintiff also alleged the manner in which he was removed when he did not corporate and step down. When Plaintiff was informed to step down and failure to do so would need some action on the part of the Defendants. The proportionality of such action needs understanding of internal rules and procedures, and interpretation of them.

33. In terms of statement of claim alleged negligence was particularised in paragraph 29 of the statement of claim and they are as follow:

- 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 allegation of protracted leadership as levelled by the first Defendant.
- d. Failed to act diligently, unbiased and fairly towards the Plaintiff, and
- e. Failed to observe that the School of Economics under the leadership of the Plaintiff was not affected in any way and students were given professional and competent teaching.

34. Though defamation and negligence are alleged, source was failure of internal rules.

35. 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."

36. 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)

37. Visitor’s jurisdiction in Fiji is exclusive in terms of Court of Appeal decision Muma v University of the South Pacific [1991] 37 F.I.R 101. The paragraphs relating to negligence and defamation are based on alleged breaches of second Defendant’s policies and procedures or sourced from them. They are having domesticity hence within the jurisdiction of a visitor.

38. Lord Griffiths in *Thomas (Supra)* held,

“I prefer the view expressed by Burt CJ. 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)*

39. 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 urgently held by a judge of an appellate court in 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

40. In my judgment Plaintiff’s claims are justiciable by visitor and form exclusive jurisdiction. Since I held that claims are not justiciable by courts, I do not wish to deal with rest of appeal grounds. So, statement of claim is struck off. Master’s ruling handed down on 4.4.2018 is set aside. Cost of this appeal summarily assessed at \$3,000.

FINAL ORDERS

- a. Statement of claim struck off.
- b. Master's ruling regarding application to strike out is set aside.
- c. Appeal is allowed.
- d. Cost of this application is summarily assessed at \$3,000.

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



Deepthi Amaratunga
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Justice Deepthi Amaratunga
High Court, Suva