

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 266 and
with its registered address at Laucala Campus, University of the South
Pacific, Private Bag, Suva

DEFENDANT

Counsel : Plaintiff: **Mr. J. Apted**
Defendant: **Mr. D. Sharma and Ms. U. Fatima**

Date of Hearing : 18.09.2018

Date of Judgment : 20.11.2019

JUDGMENT

INTRODUCTION

1. Plaintiff was employed as an Associate Professor at the Defendant's School of Management and Public Administration. His contract was not extended beyond 26.01.2014. He is alleging discrimination for not extending his terms of contract. Plaintiff is seeking a sum of \$161,340.66 being the salary payable in 2014, declaration that he was discriminated and unlawfully denied an extension of his Employment Contract, special damages for a sum of \$6,034 being reimbursement of medical expenses, general damages and interest on judgment. All claims in the statement of claim had arisen from Plaintiff's employment with Defendant and concern with internal statutes, ordinances, rules and policies of the Defendant. Plaintiff attained the age of retirement in terms of Defendant's Staff Ordinance 2009. Defendant was incorporated by a Charter and recognises visitatorial jurisdiction. Presently it is held by an appellate court judge of neighbouring country. 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. It was a case of defamation and declarations, and Court of Appeal held jurisdiction of visitor is exclusive. Even when there is no 'visitor' appointed head of state was considered as the default visitor and Court of Appeal affirmed striking out on the basis of exclusivity of the jurisdiction of visitor. Defendant had also made internal rules and procedures relating to the exercise of that jurisdiction by visitor. In terms of the Ordinance Governing Term of Office and Duties of the Visitor 'member of staff' includes former member of the staff. All the claims stated in the statement of claim are disputes between Plaintiff and Defendant and justiciable by visitor. For this courts need to find the dispute has 'domesticity' and for that *'the authorities also make it clear that, irrespective of whether the courts would be as well or better qualified to deal with the particular case, a dispute has the necessary domesticity if it involves members of the corporation and the interpretation or application of its internal rules, customs or procedures'*¹

2. Plaintiff states at the time of filing this writ of summons he was not a member of staff Defendant hence he could not appeal to visitor, but interpretation of member of staff included a former member when it concern with a person who had ceased to be a member. Plaintiff applied for strike out of action *inter alia* on jurisdiction of courts. Master did not strike out the statement of claim in the ruling handed down on 15.3.2018. Having obtained leave to appeal, this is an appeal from the said order. The statement of claim needs to be struck off *in limine* as all the claims are not justiciable by courts, so Master's decision is set aside, appeal is allowed.

FACTS AND ANALYSIS

3. Both parties have submitted written submissions and number of authorities were submitted before Master and those authorities were relied by both parties.
4. Facts of this case are not disputed. This is an appeal from Master's decision refusing strike out statement of claim.
5. Plaintiff's contract of service is subject to Defendant's charter, statutes and ordinances. The claims are subject to interpretation and or application of them and exclusive jurisdiction lies with such claims and declarations with visitor.
6. Master in his decision refused to strike out the action and by doing that held that claims in the statement of claim are justiciable by High Court. Decision of Master was an interlocutory decision hence leave was required.

¹ Hoffmann J ([1985] 3 All ER 156 at 164

7. Counsel for Plaintiff did not object to leave being granted considering the legal issues raised in the light of the decision of Court of Appeal decision in *Muma v University of the South Pacific* [1991] 37 FLR 101.
8. Defendant was established by an Order-in-Council made by her Majesty Queen Elizabeth II on 4 February 1970. This is part of Laws of Fiji. The Charter and Statutes have been amended from time to time by the Council. The Charter and Statutes authorise the Council to make Ordinances and Ordinance Governing the Term of Office and Duties of the Visitor deals with Visitation Jurisdiction. This Charter and statutes and ordinances made in terms of that are all part of internal administration of Defendant and there is no dispute as to them and they were submitted before Master and admitted in this appeal.
9. In terms of said Ordinance any dispute between a member of Defendant and Plaintiff needs to be *'reported within three calendar months of the day on which the person aggrieved first becomes aware of the subject matter of the dispute.'*
10. An Ordinance to Govern the Terms and Conditions of Service of the Academic and Professional Staff of the University (Staff Ordinance, 2009) was made in terms of Article 13 and 19 of the Charter of the University.
11. Plaintiff was previously employed by Defendant, as a Senior Fellow of the School of Management and Public Administration until about 26 January 2014 when his last contract expired.
12. The Plaintiff was over the age of 65 in 2013. During that year, he applied to Defendant, to have his Contract renewed.
13. Clause 18 of Staff Ordinance 2009 provides that the retirement age for academic staff is 65 years of age. It requires staff members to retire at the end of the year in which they reach that age but allows a staff member to be re-employed after retirement in certain circumstances. Clause 18 states:

"A member of staff shall retire at the end of the calendar year in which he/she attains the age of sixty-five...

*A staff member, as may be required by the University, may be invited for re-employment consideration. **Re employment shall be at the option of the University and shall be based on the conditional provisions set by the University.**"* (emphasis added).
14. Plaintiff's letter of appointment was subjected to internal laws of Defendant including its Charter, Statutes and Staff Ordinance. It stated at paragraph 4:

"This offer of contract is subject to the provisions of the Charter and Statutes of the University and The University of the South Pacific Staff Ordinance (2009)."

15. The Plaintiff's application for re-employment, was considered in terms of policy governing re-employment after the retirement age, approved by the Council on 16 May 2013.
16. On or about 22 November 2013 Defendant declined the Plaintiff's application for re-employment. Defendant informed the Plaintiff of this by way of a letter of 17.12. 2013 Clause 18 of the Staff Ordinance 2009 deals with retirement and reemployment and this along with reemployment policy of the Defendant needs to be considered, for reemployment of a retiree.
17. Plaintiff could bring any dispute including an appeal to visitor in terms of Ordinance Governing the Term of Office and Duties of the Visitor.
18. Plaintiff did not appeal against the said decision or refer any dispute to visitor within stipulated time periods in terms of Clauses 11 and or 12 of Ordinance Governing the Term of Office and Duties of the Visitor.
19. After expiration of said time period, the Plaintiff through his solicitors wrote a letter, to the Pro-Chancellor and Chair of the Council on 17.4. 2014.
20. A formal reply was made to the solicitors on 7.8. 2014. Plaintiff contend that letter of his solicitor should have been referred to Visitor, but this is not the procedure stipulated in Ordinance Governing the Term of Office and Duties of the Visitor.
21. On 4.2.2015, the Plaintiff issued a Writ of Summons together with a Statement of Claim against Defendant. The cause of actions contained in the statement of claim according to written submissions filed by the Plaintiff are

"Did the Defendant act lawfully in denying the Plaintiff a new contract of employment when the Plaintiff had satisfied the criteria for re-employment?"

Did the Defendant have any legitimate grounds to say that there were sufficient resources to deliver 2014 Programmed when fact the application for the Plaintiff's services were invited and recommended by the Head of School and approved by the Dean of the Faculty.

Was the Defendant liable to reimburse the Plaintiff for his medical expenses?"

22. All the above mentioned causes of action are disputes between Plaintiff and Defendant and are governed by internal laws and justiciable only by the 'visitor' in terms of Defendant's charter in line with the decision of Court of Appeal in *Muma v University of the South Pacific* [1991] 37 FLR 101.

23. Jurisdiction of visitor is succinctly dealt in following paragraph in the judgment of *Patel v University of Bradford Senate* [1978] 3 All ER 841.² at page 846

'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).

24. Such an exclusive jurisdiction is desirable for several reasons. This kind of adjudication is speedy and cost effective. It also gives confidentiality and also flexibility to deal with internal issues efficiently and effectively. Disputes between staff and students with a university which has large number of students and staff are inevitable and most will be on based on internal rules and policies.

25. *Patel v University of Bradford* [1979] 1 All ER 583, was applied in *Muma v University of the South Pacific* [1991] 37 FLR 101 and held,

We turn, therefore, to consider whether the appellant, having at the time of the issue of the writ of summons an interest as a member of the University in its well being, could seek the declarations in a Court. His Lordship referred to Patel v University of Bradford [1979] 2 All E.R. 583 and Thorne v University of London [1966] 2 Q.B. 237 as authority for the proposition that a claim by a member of a university relating to the internal affairs of the university is not justiciable in the courts. The decision in Patel's case to which his Lordship referred was given in the Court of Appeal; it affirmed the decision at first instance of Megarry V-C which is reported at [1978] 3 All E.R. 84]. The Vice-Chancellor examined in great detail decisions of the English courts from 1661 to 1973 in which the common law relating to Visitors of universities and other eleemosynary corporations was discussed and expounded. The University of Bradford had been established by the Queen. Its constitution provided for the appointment of a Visitor by the Queen upon request from the Council of the university.

26. Plaintiff in the written submission contends that he was not dismissed hence he could not seek redress by visitor. Any dispute in terms of Ordinance Governing the Term of Office and Duties of the Visitor "means a dispute between the University and any

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

member of staff or a dispute between the University and any student and includes an appeal". All the claims contained in the statement of claim are 'disputes' between Plaintiff and Defendant.

27. According to Ordinance Governing the Term of Office and Duties of the Visitor word "member of staff" is not interpreted exclusively and it 'includes a person who is former member of the staff or the University if the appeal concerns the dismissal of that person by the University'.
28. Plaintiff's claims are concerning failure to reemployment hence it is a dispute between Plaintiff and Defendant and since he had made an application for reemployment and it was refused he is a person who falls within definition of 'member of staff' who could appeal against such refusal to visitor.
29. Any purposive interpretation of word 'member of staff' needs to include former staff members who had been refused to extend their respective contracts and or refused to reemploy. If such persons are to be excluded it would create an anomaly and purpose of visitatorial jurisdiction is lost and utility in regard to 'dismissal' will become technical and restrictive.
30. So, in my judgment Plaintiff who was a former member of staff was not excluded from the jurisdiction of visitor. He had not done so, within the time period stated in Ordinance Governing the Term of Office and Duties of the Visitor.
31. The solicitors for the Plaintiff had written a letter on 17.4.2014 regarding refusal to grant a new contract to Pro Chancellor. This was more than three month time period, to bring a dispute before visitor. In the said letter there was no reference of dispute not justiciable by visitor. There was no obligation on the part of Defendant to refer a matter that was not brought before in terms of Ordinance Governing the Term of Office and Duties of the Visitor.
32. Plaintiff's term of employment are contractual and it refers to internal statutes, rules and policies of Defendant. Plaintiff had entered in to a contract of service with Defendant on above terms. So re employment after retirement also governs the same internal rules, procedures and regulations.
33. In *Thomas v University of Bradford* [1987] 1 All ER 834 in UK House of Lords, it was held that removal of person under a contract of employment, is within exclusive jurisdiction of Visitor. So in order to find a matter is justiciable by a visitor the fact that existence of contract of employment and application of Law of Contract is not the ground to deny jurisdiction of visitor.
34. So when an action relate to a dispute between a University and a member including a former member is brought court should determine whether it is justiciable. On the

pleadings this needs to be determined and a party is free to amend pleading before determination of jurisdiction.

35. 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

36. So in order to determine jurisdiction, claims as pleaded in the statement of claim must be disputes between a university and a member of the university over his contract of employment with the university involved questions relating to the internal laws of the university or rights and duties derived from those laws.

37. In order to determine jurisdiction of courts determinant factor is not the category of law pleaded, but whether application of that involve dispute which is of domestic nature, that applies statutes, rules policies that are internal to

38. *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'^{2,3}

39. In *Thomas v University of Bradford* [1987] 1 All ER 834,

'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

³ 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).'

Lord Griffiths further held,

"In the present case, the entire dispute is centred 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."

40. So, in this action Plaintiff who was under a contract of employment and was not reemployed after attainment of retirement is disputing that decision of Defendant. So his terms of contract primarily needs to be considered. It specially state statues ordinances of internal nature applies. Plaintiff is seeking re employment as a retiree and there is a policy and guidelines. These are all internal laws, procedures, notwithstanding Plaintiff is seeking declarations and or damages. The crux of the dispute between Plaintiff and Defendant is allegation of discrimination based on application of internal procedures of Defendant.

41. 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."

42. 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)

43. So a claim for damages 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 should not be allowed.

44. 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)

45. 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

46. Plaintiff's dispute with the Defendant is failure to re employ him after retirement. The source of the dispute is internal policy of re-employment. His claims for declaration and damage based on that refusal of reemployment after retirement. He is claiming discrimination. There is no ambiguity as to the dispute between Plaintiff and Defendant which is domestic. So the claims contained in statement of claim are not justiciable by courts. In my judgment, writ of statement of claim is not justiciable by courts, so there is no need to consider other grounds of appeal. Master's ruling delivered on 15.3.2018. Set aside. Statement of claim is struck off. Cost of 3,000 is awarded as cost assessed summarily.

FINAL ORDERS

- a. Master's decision is set aside.
- b. Statement of claim is struck off and action dismissed.
- c. Appeal is allowed.
- d. Cost of this appeal is summarily assessed at \$3,000 to be paid within 14 days.

Dated at Suva this 20th day of November, 2019.



Justice Deepthi Amaratunga
High Court, Suva