IN THE EMPLOYMENT RELATIONS COURT AT LAUTOKA
ORIGINAL JURISDICTION

ERCC No.02 of 2019

BETWEEN : **SALIM BUKSH**

PLAINTIFF

AND : **BRED BANK (FIJI) LTD**

DEFENDANT

BEFORE : M. Javed Mansoor, J

COUNSEL : Mr. R. R. Gordon with Mr. W. S. Pillay for the Plaintiff

: Mr. J. Apted for the Defendant

Date of Hearing : 19 October 2019

Date of Ruling : 27 August 2021

DECISION

EMPLOYMENT LAW: Essential service and industry – Whether an employment grievance affecting essential service and industry could be filed in the Employment Relations Court – Jurisdiction of the Employment Relations Tribunal – Jurisdiction of the Employment Relations Court – Action founded on an employment contract – Parliamentary reports in aid of statutory construction – Essential National Industries (Employment) Decree 2011 – Sections 211, 218 & 220 Employment Relations Promulgation 2007 – Sections 185, 187, 188 & 191BX Employment Relations (Amendment) Act No.4 of 2015 – Comparable provisions of the New Zealand Contracts Act 1991

HIGH COURT RULES: Striking out – Amendment of pleadings – Order 18 Rule 18 & Order 20 Rule 3 (1) High Court Rules 1988

The following cases are referred to in this decision:

a. Opetaia Ravai v Water Authority of Fiji [2020] FJHC 53**;** ERCC 13.2018 (7 February 2020)
b. Ajendra Sharma v Australia and New Zealand Banking Group Limited {2020] FJHC 650; ERCC 2.2017 (14 August 2020)
c. Bulavakarua v Ministry for Education, Heritage and Arts [2019] FJHC 947; ERCC 17. 2018 (27 September 2019)
d. FTU v Ministry of Education [2018} FJHC 842; ERCA 12.2018 (11 September 2018)
e. Northern Local Government Officers Union Inc. v Beazley AEC 42/91 [1991] NZEmpC 84; (1992) 4 NZELC 98,139, [1992] 1 ERNZ 1109 (3 December 1991
f. Vinod v Fiji National Provident Fund [2016] FJCA 23; ABU 0016.2014 (26 February 2016)
g. Hazelman v Fiji Hardwood Corporation Limited [2014] FJHC 101; HBC 79.2010 (25 February 2014)
h. Pepper v Hart [1993] 1 All ER 42
i. Islington London Borough Council v UCKAC [2006] 1 WLR 1303
j. Johnson v Unisys Ltd [2001] 2 All ER 801
k. Eastwood v Magnox & McCabe v Cornwall County Council [2004] 3 WLR 322

1. This proceeding to strike off the plaintiff's action for dismissal from employment raises certain important matters. The plaintiff, who was employed as branch manager of the defendant's Suva bank branch, commencing 12 October 2012, filed a writ of summons on 5 April 2019 claiming his services were terminated after a period of suspension on unsubstantiated grounds of misconduct. Denying that he was guilty of misconduct, the plaintiff claimed that his services were initially suspended on 9 July 2018 on trumped up charges pending an investigation. Thereafter, the plaintiff pleaded, his services were unfairly terminated on 15 March 2019 without completing investigations, even though he was given a written assurance that the investigation would be completed. The steps taken against him, the plaintiff alleged, were actuated by personal animosity on the part of senior bank officers. The nature of the alleged misconduct, and the counter allegations against the employer are not of importance at this stage.

2. The defendant, after filing an acknowledgment of service on 15 April 2019, filed a summons on 2 May 2019 seeking to strikeout the statement of claim – which was settled personally by the plaintiff – and dismiss the action. After appointment of his solicitors, the plaintiff filed a summons on 16 August 2019 seeking to amend the statement of claim, supported by an affidavit from the plaintiff to which was annexed the proposed statement of claim. Consequently, when the matter was set for hearing, there were two summons before court: the defendant's summons for strikeout and the plaintiff's summons for amendment of the statement of claim. On the day of hearing, counsel for the defendant consented to the amendment, reserving his right to raise objections when the amended statement of claim is filed; the plaintiff's counsel agreed to the defendant's position. Submissions were limited to the strike out application. The ruling, therefore, concerns the strikeout application which bears reference to the original statement of claim. However, as will be seen presently, the proposed statement of claim is not without relevance to the court's ruling.

3. The defendant's summons prayed *inter alia* for, "the statement of claim be wholly struck out and the action be dismissed……on the grounds that the statement of claim (a) discloses no reasonable cause of action (b) is scandalous, frivolous or vexatious (c) may prejudice, embarrass or delay the fair trial of the action or (d) is otherwise an abuse of the process of court; in that the Employment Relations Court has no jurisdiction whether under the Employment Relations Act 2007 or otherwise to adjudicate over the plaintiff's claim as pleaded in his statement". The summons to strike out was made by citing Order 18 Rule 18[1].

4. In short, the defendant's contention is that the plaintiff, who was a worker of a designated corporation under the Essential National Industries (Employment) Decree 2011 (ENIED), was not entitled to file or lodge an employment grievance in the Employment Relations Court (Court). It was contended that the plaintiff could only have filed or lodged an employment grievance in the Employment Relations Tribunal (Tribunal) in terms of the provisions of the Employment Relations Promulgation 2007 (Promulgation) and the Employment Relations (Amendment) Act No.4 of 2015 (Act No.4 of 2015). This contention turns on the now repealed ENIED and related provisions of Act No.4 of 2015, along with those of the Promulgation concerning the jurisdiction of the Court and that of the Tribunal in deciding this delicately contentious issue.

Was the plaintiff a worker in the essential national industries?

5. The ENIED was published by government gazette on 29 July 2011. Essential national industries and designated corporations were set out by regulations which came into effect on 9 September 2011. The purpose of the decree was to "ensure the viability and sustainability of certain industries that are vital or essential to the economy and the gross domestic product of Fiji". Essential National Industry was to defined to mean "those industries: (a) which are vital to the present and continued success of the Fiji National Economy or gross domestic product or those in which the Fiji Government has a majority and essential interest; and (b) which are declared as essential national industry by the Minister under Regulations made pursuant to this Decree". A consequence of the ENIED was that all pending proceedings against a designated corporation, including appeals, would terminate immediately upon the commencement of the decree.

[1] High Court Rules 1988

The objective was to provide for the prompt and orderly settlement of all disputes[2].

6. Counsel for the plaintiff submitted that in terms of section 191 BX of Act No.4 of 2015, the ENIED was repealed and the defendant ceased to be a designated corporation under this decree. In the event, he submitted, sections 185 and 188 under Part 19 of Act No.4 of 2015 did not apply to the defendant, and the Court was possessed of jurisdiction in terms of part 20 of the Promulgation as amended.

7. The provisions of Act No.4 of 2015, which repealed the ENIED, need to be examined to make a finding as to whether any part of it has been preserved. Section 191 BX sets out the repeals. The enactment states:

"Except to the extent saved by this part, the following laws are repealed-

a. Essential National Industries (Employment) Decree 2011;
b. Employment Relations (Amendment) Decree 2011; and,
c. Public Service (Amendment) Decree 2011"

8. The phrase "except to the extent saved by this part" in section 191 BX, in my view, needs to be read along with section 185 of the Act which sets out the definitions under Part 19, titled, "Essential Services and Industries".

> Essential service and industry or essential services and industries is defined to mean "a service listed in Schedule 7 and includes those essential national industries declared and designated corporations or designated companies designated under the decree, and for the avoidance of doubt shall also include – (a)….(f)".

The ENIED included the financial services industry as an essential national industry (Act No.4 of 2015 uses the term essential service and industry). By Essential National Industries & Designated Corporations (Amendment) Regulations 2012 published by Extraordinary Fiji Government Gazette Supplement[3], Bred Bank (Fiji) Limited was included as a designated corporation

[2] Vinod v Fiji National Provident Fund [2016] FJCA 23; ABU 0016 of 2014 (26 February 2016)
[3] No.19 dated 24 April 2012

by amending schedule 1 of the Essential National Industries & Designated Corporations Regulations 2011.

9. As section 185 preserves the corporations and companies designated under the ENIED notwithstanding its repeal, at the time the plaintiff was dismissed from employment, the defendant must be taken as a designated corporation under the ENIED, and the plaintiff as a worker under the defendant's employ as defined in Act No.4 of 2015.

Remedy of an aggrieved worker in the essential national industries

10. Part 19 of the Promulgation was repealed and substituted by a new Part 19 in Act No.4 of 2015. Part 19 applies to all essential services and industries. All trade disputes in essential services and industries were to be dealt with the Arbitration Court established under the amendment. Section 188 (3) of Act No.4 of 2015 provided that "Part 20 shall not apply to essential services and industries, except as provided under subsection (4)". Part 20 of the Promulgation established the Court and the Tribunal.

11. The defendant contended that in terms of section 188 (3) & (4)[4] the Court has no original jurisdiction to hear the plaintiff's action, and that the section only made provision to deal with an employment grievance. Parts 13 and 20 of the Promulgation did not make provision, it was submitted, for employment grievances to be brought before the Court. Mr. Apted submitted that the scheme of the Promulgation was such that a grievance must initially be referred to mediation before it could be taken up by the Tribunal. On the other hand, he submitted, section 220 of the Act permitted either a worker or an employer to institute an action in this court – as distinct from a statutorily defined employment grievance initiated by a worker. This limitation, Mr. Apted submitted, did not amount to an ouster of court. Instead, he submitted, the legislation introduced a new scheme to deal with employment disputes between the employer and employee under the Promulgation.

[4] Act No.4 of 2015

12. Mr. Gordon, on behalf of the plaintiff, drew the Court's attention to the decision in *FTU v Ministry of Education* ERCA 12 of 2018[5]. He argued that the worker has a choice as to where he could lodge his grievance, and may file it directly in the Court instead of in the Tribunal. The intention of Parliament, it was submitted, was not to deny a worker from having access to the Court. The plaintiff relied upon two judgments of Wati, J: *Opetaia Ravai v Water Authority of Fiji*[6] and *Ajendra Sharma v Australia and New Zealand Banking Group Limited*[7] in submitting that the strike out application should be dismissed. Mention was also made of the decision in *Bulavakarua v Ministry for Education, Heritage and Arts*[8].

13. The Promulgation did create a new regime for the resolution of employment grievances and disputes. The Tribunal and the Court were established by the Promulgation. In order to determine the question at issue, the relevant statutory provisions must be understood having regard to the law as a whole, and their meaning must be derived from the four corners of the statute without resort to extraneous considerations; and the provisions of the amendment must be read in harmony with those originally contained in the Promulgation.

14. Section 110 of the Promulgation speaks of employment grievance procedures to be included in an employment contract. An employment grievance must first be raised with the employer[9]. This must be done within 6 months unless the employer agrees to an extension of the period or where the Tribunal grants an extension[10]. Once an extension is granted the Tribunal may hear the grievance or refer it for mediation. Section 194 (5) of the Promulgation casts a duty on the mediator in this way, "if a mediator fails to resolve an employment grievance or an employment dispute, the mediator *shall* refer the grievance or dispute to the Tribunal". It will be seen that the reference here is to the Tribunal. The mediator has no

[5] [2018] FJHC 842; ERCA 12.2018 (11 September 2018)
[6] [2020] FJHC 53; ERCC 13.2018 (7 February 2020)
[7] [2020] FJHC 650; ERCC 2 of 2017 (14 August 2020)
[8] [2019] FJHC 947; ERCC 17. 2018 (27 September 2019)
[9] Section 111 (2) Employment Relations Promulgation 2007
[10] Section 111 (2) & (3) *ibid*

discretion in the selection of the forum for the purpose of making the reference. Section 211(1)(a) has expressly confers jurisdiction on the Tribunal to adjudicate employment grievances.

15. As Bred Bank (Fiji) Limited has been kept intact as a designated corporation notwithstanding the repeal of the ENIED, the plaintiff was entitled to file or lodge a grievance within 21 days of that grievance arising in terms of parts 13 and 20 of the Promulgation. This is permitted by Section 188 (4) of the Promulgation as amended by Act No.4 of 2015.

16. The amended section 188 (3) & (4) of the Promulgation states:

> "(3) For the avoidance of doubt, Part 20 shall not apply to essential services and industries, except as provided under subsection (4).
>
> (4) Any employment grievance between a worker and an employer in essential services and industries that is not a trade dispute shall be dealt with in accordance with Parts 13 and 20, provided however that any such employment grievance must be lodged or filed within 21 days from the date when the employment grievance first arose, and—
>
> (a) where such an employment grievance is lodged or filed by a worker in an essential service and industry, then that shall constitute an absolute bar to any claim, challenge or proceeding in any other court, tribunal or commission; and
>
> (b) where a worker in an essential service and industry makes or lodges any claim, challenge or proceeding in any other court, tribunal or commission, then no employment grievance on the same matter can be lodged by that worker under this Promulgation"

17. Once an employment grievance is filed in terms of section 188 (4), it will constitute an absolute bar to proceedings in any other forum. Similarly, where a worker in an essential service and industry makes or lodges any claim, challenge or proceeding in any other court, tribunal or commission, then no other employment grievance on the same matter can be lodged by that worker under

the promulgation. The provision, however, does not specify where the grievance is to be filed.

18. The phrase, "shall be dealt with in accordance with parts 13 and 20" could give the impression that an aggrieved worker has a choice of forum to redress an employment grievance. Part 13 of the Promulgation deals with employment grievances, while Part 20 refers to institutions including the Tribunal and the Court. These provisions must be read alongside other provisions of the Promulgation and the amendments.

19. The plaintiff filed the grievance in the Tribunal within time and the defendant did not challenge the plaintiff's entitlement to do so. According to the plaintiff, some seven months later it withdrew the grievance. Later, an action was filed in the Court. No reason is stated for the withdrawal of the grievance and the filing of this action. The plaintiff did not have the assistance of a lawyer when the statement of claim was originally filed. However, the summons to amend together with the proposed statement of claim was filed on the plaintiff's behalf by his solicitor.

20. Section 220 of the Promulgation does not expressly confer original or concurrent jurisdiction to the Court to hear an employment grievance except where proceedings are transferred from the Tribunal in the special situations stipulated by section 218 (2) of the Promulgation. The Court could assume jurisdiction on matters transferred to it by the Tribunal[11]. This may be done only on two prescribed grounds; if the Tribunal is of opinion that an important question of law is likely to arise or the case is of such a nature and of such urgency that it is in the public interest that it be so transferred. Beyond these two grounds the Tribunal does not seem to possess the discretion to transfer proceedings to the Court. Where the Tribunal declines to transfer proceedings, the party concerned has the right to seek special leave for transfer of proceedings. In such event, the Court must apply the criteria under which the Tribunal should have based its

[11] Section 218 *ibid*

decision on whether or not to transfer proceedings[12]. Where the transfer was not properly made, the Court could direct the Tribunal to adjudicate on the proceedings in the first instance[13]. Moreover, the Tribunal may refer a question of law to the Court for its opinion and may for that purpose defer adjudicating upon and adjourn the proceedings subject to receiving that opinion[14]. These provisions suggest that neither the Court nor the Tribunal could make orders to transfer proceedings contrary to the conditions imposed by the statute. In cases where the Tribunal is of opinion that the jurisdictional limit placed upon it gives rise to an expediency envisaged by section 218 (2) of the Promulgation, in my view, it is competent for the Tribunal to consider whether in the circumstance of the case it is proper to transfer proceedings to be heard by the Court. Once a matter is before it, the Court has full and exclusive jurisdiction to determine them in a manner and to make decisions or orders not inconsistent with the Promulgation or any other written law or the employment contract[15].

21. It is apt at this point to consider the effect of section 230 of the Promulgation. The section sets out the remedies for employment grievances. Section 230 (1) states, if the Tribunal or the Court determines that a worker has an employment grievance, it may, in settling the grievance, order one or more of the following remedies. Reinstatement, reimbursement of wages and payment of compensation are the stated remedies. Section 230 (2) states, if the Tribunal or Court determines that a worker has an employment grievance by reason of being unjustifiably or unfairly dismissed, the Tribunal or Court may consider whether a worker has contributed to the situation giving rise to the employment grievance and reduce the available remedies. Section 230 (3) provides, if the remedy of reinstatement is provided by the Tribunal or the Court, the worker must be reinstated immediately or on a specified date and notwithstanding an appeal. This enactment could lead to the impression that an employment grievance could be dealt with by the Tribunal as well as the Court at the choice of the worker. In my view, this is not so. Collectively, sections 211, 218 and 220 of

[12] Section 218 (3) *ibid*
[13] Section 218 (5) *ibid*
[14] Section 217 *ibid*
[15] Section 220 (3) *ibid*

the Promulgation regulate the jurisdiction to adjudicate or hear an employment grievance.

22. Mr. Gordon submitted that the Court as a division of the High Court had unlimited original jurisdiction, and that the Court has power to hear the case as the Tribunal did not have the jurisdiction to pay compensation in excess of $40,000. His reference is to the limitation contained in section 211 (2) (a) of the Promulgation which states that the Tribunal has power to adjudicate on matters within its jurisdiction relating to claims up to $40,000. I agree with the plaintiff that the monetary limitation could pose a difficulty in some cases, particularly where the claims are of a large value. However, the Tribunal's jurisdictional limit alone is not a sufficient ground for the Court to assume jurisdiction when Parliament has not expressly given the Court the right to hear an employment grievance.

23. Courts have recognised the difficulties in attaining corrective justice when statutory limits are placed on the award of compensation. In *Johnson v Unisys*[16], Lord Steyn, in his dissenting judgment, made reference to the possible injustice as a result of such statutory limits when he observed,

> "The statutory system was therefore always only capable of meeting the requirements of cases at the lower end of seriousness. Manifestly, it was always incapable, for example, of affording any significant financial compensation to employees with substantial salaries and pension entitlements in cases where they suffered a serious loss of employment prospects due to the manner of their dismissal. In such cases, inter alia, the artificial statutory limits from the inception inhibited significant compensation".

24. In *Eastwood v Magnox & McCabe v Cornwall County Council*[17], the House of Lords stated,

[16] [2001] 2 All ER 801 at 812
[17] [2004] 3 WLR 322 at 327

> "…….In the statutory code Parliament has addressed the highly sensitive and controversial issue of what compensation should be paid to employees who are dismissed unfairly. This code is now an established and central part of this country's employment law. The code has limited the amount payable as compensation. In 1971 the limit was £4,160. Reflecting inflation, this limit was raised periodically up to £12,000 in 1998. In the following year (Employment Relations Act 1999, section 34 (4)) the statutory maximum was raised in one bound to £50,000. From there it has risen to the present figure of £55,000.
>
> "In fixing these limits on the amount of compensatory awards Parliament has expressed its view on how the interests of employers and employees, and the social and economic interests of the country as a whole, are best balanced in cases of unfair dismissal. It is not for the courts to extend further a common law implied term when this would depart significantly from the balance set by the legislature. To treat the statutory code as prescribing a floor and not a ceiling would do just that. A common law action for breach of an implied term not to be dismissed unfairly would be inconsistent with the purpose Parliament sought to achieve by imposing limits on the amount of compensatory awards payable in respect of unfair dismissal. It would also be inconsistent with the statutory exclusion of the statutory right where an employee had not been employed for a qualifying period or had reached normal retiring age or the age of 65 and, further, with the parliamentary intention that questions of unfair dismissal should be dealt with by specialised tribunals and not the ordinary courts of law".

25. The statutory framework, in my view, lends itself to a construction that vests the Tribunal with the jurisdiction to hear employment grievances except in the situations specified by statute. If jurisdiction was to have been conferred on the Court – in the way it has been on the Tribunal, with clear language – it is to be expected that the legislative drafter would have made that position clear expressly or by implication. The limitation in value – legislated in 2007 – must be seen as reflecting a policy decision by the legislature. It is for Parliament to decide whether conditions are ripe for an enhancement of the statutory limit placed on the Tribunal. The accepted position is that a court will not have jurisdiction where it is not conferred.

26. With respect, therefore, I have not adopted the reasoning of the decisions relied upon by the plaintiff. The provisions of the Promulgation when considered as a

whole permits the Court to exercise original jurisdiction in the limited situation provided for by the statute itself. In my view the Tribunal is vested with exclusive jurisdiction to hear employment grievances subject to section 218 of the Promulgation. In terms of part 19, the plaintiff's remedy was to file or lodge an employment grievance in the Tribunal, which he did. It is the subsequent withdrawal of the grievance and the filing of this action which has placed him in a contentious position.

27. I am driven to the conclusion, therefore, that the plaintiff was not entitled to file a grievance in the Court. The proceeding in that form could not have been sustained in the Court. On the day of the hearing, however, the defendant consented to the plaintiff's application to amend the statement of claim subject to its defences. Nevertheless, the oral and written submissions of the parties mainly related to the plaintiff's original statement of claim (this may have been because the strike out summons concerned the original statement of claim and amendment to the statement of claim was consented to on the day of hearing). In light of this, although technically the defendant should succeed against the statement of claim on record, the question is whether the action is liable to be dismissed.

28. Several cases were cited by the defendant in support of the argument to strike off the statement of claim and dismiss the action. These dealt with the principles of strike off in general, which are well recognised, but were not particularly helpful in deciding the questions in these proceedings. Therefore, I make no reference to those authorities.

29. Section 220 (1) (h) of the Promulgation provides that the Court has jurisdiction to hear and determine an action founded on an employment contract. Paragraph (i) provides that subject to subsection (2) and in proceedings founded on an employment contract, the Court has the jurisdiction to make any order that the Tribunal may make under any written law or the law relating to contracts.

30. The phrase, "action founded on an employment contract", can, therefore, be taken to include reference to a cause for dismissal based on breach of contract similar to the common law wrongful dismissal action. Where an action is founded on an employment contract the Court would have jurisdiction to determine a claim for damages for dismissal from employment. Such an action would attract the usual principles attendant on a damages claim including the principles of mitigation. An action founded on an employment contract can be heard and determined by the Court. Importantly, in proceedings founded on an employment contract, subject to section 220(2) of the Act[18], the Court has jurisdiction to make any order that the Tribunal may make under any written law or the law relating to contracts[19].

31. This leads to the question whether section 188 precludes the plaintiff from filing an action founded on an employment contract in terms of section 220(1)(i), or a common law action without reference to the Promulgation. In both cases the answer would appear to be in the negative. An action for breach of contract (such as for repudiatory breach) could be filed in the Court in accordance with the provisions of the Promulgation. On the other hand, there is no reason why a common law action for breach of contract cannot be filed in the High Court as any civil action without reference to the Promulgation. Common law rights and rules are not to be taken away by statute except by express language or clear implication[20]. The provisions of the Promulgation do not appear to impede the filing of such an action. Amaratunga, J in *Hazelman v Fiji Hardwood Corporation Limited*[21] pointed that this was so even with the provisions of the ENIED as it did not prevent a party to an employment contract from filing an action for breach of contract. His Lordship held that the prohibition in the decree was in respect of proceedings under the Promulgation.

[18] A limitation is placed on the court's power to cancel or vary an employment contract or a term therein
[19] Section 220(1)(i) *supra*
[20] Islington London Borough Council v UCKAC [2006] 1 WLR 1303
[21] [2014] FJHC 101; HBC 79 of 2010 (25 February 2014)

32. The proposed statement of claim tendered by the plaintiff shows a change in the character of the proceeding, which is not disallowed by the rules[22]. The proposed claim is an action for damages for breach of contract[23], and does not seem to be in the nature of an employment grievance as in the original statement of claim. The defendant has consented to the amendment subject to his defences, and the plaintiff's application for amendment is allowed by the Court. For these reasons, the summons to strike out is dismissed. The defendant is entitled to file its statement of defence once the amended statement of claim is filed and served.

33. Two aspects of submissions on behalf of the defendant merit mention for completeness. One concerns a reference made in Parliament by the Attorney General during the passage of the bill to amend the Promulgation in 2015. The other relates to a decision of the New Zealand Full Court of Employment.

34. Mr. Apted drew attention to a paragraph on page 1495 of the Parliament's proceedings relating to the vote on the Employment Relations (Amendment) Bill, 2015 on 8 July 2015. The paragraph reads:

> "The Standing Committee further amended the section to remove the term "employment grievance" on clause 70 of the Bill[24]. The term "employment grievance" was removed because employment grievances are issues between the individual worker and the employer, and are dealt with by the Tribunal. Hence, such employment grievances do not need to be referred to the Permanent Secretary as in the case of disputes. That gives the employees a lot more opportunities to be equally heard".

Proceedings in Parliament and reports of its standing committees can be called in aid to understand the legislature's intention and to interpret legislation[25]. The speech of the Attorney General concerned section 170 of the Bill on employment disputes. The mention of employment grievance was in the context of its removal

[22] Order 20 Rule 3 (1) High Court Rules 1988
[23] Section 188(4)(b) *supra*
[24] The mentioned clause is possibly an error, and should read as clause or section 170 of the Bill No.10 of 2015
[25] Pepper v Hart [1993] 1 All ER 42

from that enactment as it was erroneously included. The report's reference to the forum in relation to an employment grievance is noted.

The New Zealand Statute

35. Mr. Apted relied on two New Zealand decisions, and referred to provisions of New Zealand's repealed Employment Contracts Act 1991 in support of his contention that an employment grievance could only be lodged in the Tribunal and not in the Court. In *Northern Local Government Officers Union Inc v Beazley and others*[26], the Employment Court of New Zealand, stated:

> "It seems clear that although the Tribunal has sole original jurisdiction to deal with personal grievances, with the court's functions being limited except under s.94 to an appellate role, the same is not true where a breach of an employment contract is alleged".

36. It will not be necessary for present purposes to analyse the provisions of the New Zealand statute, except to say that a comparison of the relevant sections will exhibit the remarkable likeness of the provisions of our Promulgation to that of the New Zealand Contracts Act 1991, which has been replaced by the Employment Relations Act 2000.

37. Section 211 (1) of our Promulgation and the corresponding provisions conferring jurisdiction on the Employment Tribunal under New Zealand's repealed Employment Contracts Act 1991[27] are very similar. Some paragraphs of the respective sections have the exact wording. For instance, in regard to the jurisdiction of the Employment Tribunal, section 79 (1) of the New Zealand statute states:

> "(g) To adjudicate on all actions for breach of an employment contract:

[26] AEC42/91 [1991] NZEmpC 84; (1992) 4 NZELC 98,139, [1992] 1 ERNZ 1109 (3 December 1991) delivered by the Full Court

[27] This was repealed by the Employment Relations Act 2000

(h) To adjudicate on any question connected with the construction of any employment contract which 1991, No. 22 Employment Contracts 225 arises in the course of any proceedings properly brought before the Tribunal:
(i) To adjudicate on any question connected with the construction of any provision of this Act, or any other Act, which arises in the course of any proceedings properly brought before the Tribunal, notwithstanding that the question concerns the meaning of the Act under which the Tribunal is constituted or under which it operates in a particular case:".

Save for minor differences, this is virtually the same wording as is found in paragraphs (g), (h) and (i) of the Promulgation.

38. The sections conferring jurisdiction on the Court under the Promulgation and on the Employment Court under the Employment Contracts Act 1991 are also strikingly similar. The wording in section 104 (f), (g) and (h) state:

(f) To hear and determine any question connected with any employment contract which arises in the course of any proceedings properly brought before the Court:
(g) To hear and determine any action founded on an employment contract:
(h) Subject to subsection (2) of this section, to make in any proceedings founded on or relating to an employment contract any order that the High Court or a District Court may make under any enactment or rule of law relating to contracts:…".

Aside from very minor differences these paragraphs are the same as those contained in section 220(1) (g) (h) and (i) of the Promulgation.

39. The statutory comparisons, and the decision of the Employment Court of New Zealand are noteworthy. They may be impactful in deciding the questions on jurisdiction raised in this proceeding. The decision I have reached, however, is based on the provisions of the Promulgation and the Employment Relations (Amendment) Act No.4 of 2015, and I have not considered the defendant's submissions on the New Zealand position in its fuller statutory context.

40. The decision is delivered electronically in view of operative pandemic protocols.

ORDER

A. The plaintiff's summons filed on 16 August 2019 seeking leave to amend the statement of claim is allowed.

B. The defendant's summons filed on 2 May 2019 to strike out the plaintiff's statement of claim and the action is dismissed.

C. The plaintiff is to file and serve its amended statement of claim after the pandemic related official restrictions are removed. The amended statement of claim and the pleadings to follow will be filed and served in terms of the rules of the High Court.

D. The defendant is directed to pay the plaintiff costs summarily assessed in a sum of $1000 prior to the filing of the statement of defence.

Delivered at **Suva** this 27th day of **August, 2021**

M. Javed Mansoor
Judge

SOLICITORS:

Gordon & Co. for the plaintiff
Munro Leys for the defendant