

IN THE EMPLOYMENT RELATIONS COURT AT SUVA
CENTRAL JURISDICTION
CIVIL JURISDICTION

ERCC: 01/23

BETWEEN: NUNIA AKENETA BOGI

PLAINTIFF/RESPONDENT

AND: DIRECTOR OF PUBLIC PROSECUTION

DEFENDANT/APPLICANT

Date of Hearing : 29 June 2023
For the Appellant : Ms Serukali
For the Respondent: Ms Harrikisoon and Ms Pratap
Date of Decision : 20 July 2023
Before : Levaci SLTTW, J

DECISION

(SUMMONS TO STRIKE OUT)

Cause and Background

1. The Plaintiff/Respondent had filed an Originating Summons which was later converted into a Writ of Summons. She seeks reliefs for the unlawful and unfair termination of her employment with the Defendant/Applicant.
2. The Plaintiff/Respondent had signed a contract on 1st September 2019 with the Defendant/Applicant as a Senior Training Officer. This was later terminated on 20 May 2022 the Defendant/Applicant terminated his employment.

3. The reasons for the termination was that the Plaintiff/Respondent had acted insubordination when she sort written directives from Director Human Resources for having been relieved of her work duties from being a Senior Training Officer to serving in the reception and acquitting witness allowances and there were allegations of non-performance despite being counselled.

4. The Plaintiff is now claiming the following reliefs:

(i) *Compensation for the remainder of the salary, statutory dues from the wages to be paid, medical costs, compensation for humiliation, loss of dignity and injury for feelings, reinstatement, a reference letter by DHR an apology letter from the DHR and the DPP and other remedies that my solicitors see fit to add during the substantial submission stage;*

(ii) *That a rough estimate of the remedies that I am seeking outlined as follows and not limited to:*

<i>5 months 12 days wages lost as a result of grievance</i>	<i>\$17,000</i>
<i>Damages for humiliation, loss of dignity and injury to Feelings</i>	<i>\$25,000</i>
<i>Medical costs</i>	<i>\$6,500</i>
<i>Costs of proceedings</i>	<i>\$6,000</i>
<i>Total remedies claimed</i>	<i>\$54,500.00</i>

(iii) *7 months 29 days for no meaningful employment.*

5. The Defendant/Applicant had filed a Strike Out Application against the Plaintiff/Respondent under Order 18 rule 18 (d) on the grounds that :

(i) *It relates to an employment grievance that fails to comply with section 188 (4) of the Employment Relations Act 2007 ('Act') and therefore exceeds the jurisdiction of the Court;*

(ii) *Otherwise an abuse of process.*

Parties Submissions for Striking Out

6. In the Defendant/Applicants oral and written submissions argued that pursuant to section 185 of the Employment Relations Act 2007 as amended in 2015, the Director of Public Prosecution was a statutory authority, established under the State Services Decree 2009 and continued in existence under Section 117 of the Constitution 2023. By virtue of its existence, fell within the ambit of Essential Services defined under Section 185 of the Employment Relations Act 2007 as amended and the decision of Madam Justice Wati in the case of Construction, Energy and Timber Workers Union of Fiji and PAFCO Employee Union –v- Fiji Electricity Authority and Pacific Fishing Company Limited (ERCA 11 of 2011) holding that statutory authorities was wide enough to include all authorities established by statute whether commercial or otherwise.
7. They argued that given that it was a statutory authority, section 188 (4) of the Employment Relations Act 2007 stipulated that all essential services, the mandatory procedural requirement was that the employment grievance be filed within 21 days when it first arose.
8. The Plaintiff/Respondent argued otherwise that the application was made within the time frame stipulated in 188 (4) of the Employment Relations Act 2007.

Law on Striking out applications

9. Order 18 (1) of the High Court Rules empowers the Court to strike out proceedings on the following grounds –
 - (a) *It discloses no reasonable cause of action or defence as the case may be or*
 - (b) *It is scandalous, frivolous or vexatious or*
 - (c) *It may prejudice, embarrass or delay’.*
10. The rules for striking out are wide and general and useful to enforce rules of pleadings. In the Supreme Court Practice 1988 (Vol 1 Sweet Maxwell Ltd, London) pg 313 para 18/19/1 states –
 - (i) *by summary process i.e without a trial in the normal way to stay or dismiss an action or enter judgement against the Defendant, where the pleading discloses no reasonable cause of action or defence, or where the action or*

defence is shown to be frivolous or vexatious or otherwise an abuse of process of the court and

(ii) To strike out any pleading or indorsement or any matter contained therein which does not conform with the overriding rule that a pleading must contain only material facts to support a party's claim or defence, and must not therefore be, or contain any matter which is, scandalous, frivolous, or vexatious or which may prejudice, embarrass or delay the fair trial of the action or is otherwise an abuse of the process of the court.'

11. In paragraph 18/19/2¹ states that :-

'The Application should specify precisely what order is being sought e.g strike out or a stay or dismiss the action to enter a judgement and precisely what is being attacked whether the whole pleading or indorsement or only parts thereof an if so the alleged offending parts should be clearly specified.

The application may be made on any or all the grounds mentioned in this rules but such grounds must be specified. Moreover the application maybe and frequently is, made both under this rule and under the inherent jurisdiction of the Court at the same time, and although it is not strictly necessary to put the words under the inherent jurisdiction of the Court, in the application a properly drawn application would expressly invoke the powers of the Court under this rule under its inherent jurisdiction (see Vinson –v- The Prior Fibres Consolidated Ltd [1906] W.N 209).''

12. The power to strikeout is not mandatory but is discretionary. For ground in Rule (1) (d) of Order 18 in para 18/19/17² the term "abuse of court process" is explained as –

'The term connotes that the process of the Court must be used bona fide and properly and must not be abused. The Court will prevent the improper use of its machinery, and will, in a proper case, summarily prevent is machinery from being used as a means of vexation and oppression in the process of litigation (see Castro – v- Murray (1875) 10 Ex. 213; Dawkins –v- Prince Edward of Sax Weimar Willis –v- Earl Beauchamp (1886) 11 P. 59, per Bowen L.J p.63)''

¹ Supreme Court Practice 1988 (Vol 1 Sweet Maxwell Ltd London) pg 313 and 314
² Ibid page 324

13. In the case of Len Lindon -v-Commonwealth of Australia (No.2) [1996]HCA4; (1996) 136 ALR 251 (1996) 70 AJLR 541 (6 May 1996) in which Len Lindon was seeking declaration in his Statement of Claim. His Lordship Justice Kirby provided an approach by the court to the Commonwealths application in summary as follows –

- (i) *It is a serious matter to deprive a person of access to the courts of law or it is there that the rule of law is upheld including against the Government and other powerful interests and that the relief is rarely and sparingly used;*
- (ii) *To secure relief the party seeking it must show that it is clear on the face of the opponents documents that the opponent lacks reasonable cause of action or is advancing a claim that is clearly frivolous or vexatious*
- (iii) *An opinion of the Court that a case is weak and such that it is unlikely to succeed is not, alone, sufficient to warrant summary termination (24). Even a weak case is entitled to the time of court. Experience teaches that concentration of attention, elaborated evidence and argument and extended time for reflection will sometimes turn an apparently unpromising cause into a successful judgement;*
- (iv) *Summary relief of the kind by Order 26 r 18 (Australia High Court Rules) is not a substitute for demurrer (25), if there is a serious legal question to be determined, it should ordinarily be determined at a trial for the proof of facts may sometimes assist the judicial mind to understand and apply the law that is invoked and to do so in circumstances more conducive to dealing a real case involving actual litigants rather than one determined on imagined or assumed facts;*
- (v) *If notwithstanding the defects of pleadings, it appears that a party may have a reasonable cause of action which it has failed to put in proper form, a court will ordinarily allow that party to reframe its pleadings;*
- (vi) *The guiding principle is to do what is just. if it is clear that proceedings within the concept of the pleading under scrutiny are doomed to fail, the court should dismiss the action to protect the defendant from being further troubled, to save the plaintiff from further costs and disappointment and to relieve the Court of the burden of further wasted time which could be devoted to determination of claims which have legal merits.”*

Analysis

14. In order to determine whether the Defendant/Applicant has substantiated grounds for establishing their application to strike out the Plaintiff/Respondents Statement of Claim, the court must first determine if the Defendant/Applicant is an essential service provider within the meaning of section 188 of the Employment Relations Act.

Is DPP an Essential Service provider?

15. The Director of Public Prosecution is a Constitutional Office established under section 117 of the Constitution 2013. Under section 117 of the Constitution states –
- '117 (1) the office of the Director of Public Prosecutions established under the State Services Decree 2009 continues in existence.*
- (12) The Director of Public Prosecution shall have the authority to appoint, remove and institute disciplinary action against all staff (including administrative staff) in the office of the Director of Public Prosecution.*
- (13) The Director of Public Prosecution has all the authority to determine all matters pertaining to the employment of all staff in the office of the Director of Public Prosecutions, including –*
- (a) The terms and conditions of employment;*
 - (b) The qualification requirements for appointment and the process to be followed for appointment, which must be an open, transparent and competitive selection process based on merit*
 - (c) The salaries, benefits and allowances payable, accordance with his budget as approved by Parliament and*
 - (d) The total establishment of the total number of staff that are required to be appointed, in accordance with the budget as approved by Parliament."*
16. From the Constitution, it is clear that the powers to appoint and terminate staff and determine their salaries and allowances are derived from the Constitution. Section 117 of the Constitution 2013 continues the existence of the Defendant/Applicants which was initially established under the State Services Decree 2009. The provision recognizes the existence of the office with powers and responsibilities for staff derived from the Constitution directly.
17. DPP is rendered independent from civil service by virtue of its constitutional makeup and thus Parliament is required to provide adequate funding directly in accordance with section 117 (15) of the Constitution to maintain its independence.

18. However there is no corporate personality conferred by written law on the Defendant/Applicant although it is empowered to determine directly the monies which are approved to it by Parliament in order to maintain its independence.
19. Contrary to submissions by the Defendant/Applicant, the DPP is not a statutory authority as it derives its powers directly from the Constitution of 2013.
20. Section 3 (1), (2) and (3) of the Employment Relations Act 2007 (referred to as 'ÉRA') as amended renders the ERA applicable to all employers and workers in workplaces in Fiji including the Government, other Government entities, local authorities, statutory authorities and the sugar industry.
21. Thus it can be said that the Defendant/Applicant is part of Government and that those that are employed by it considered as Government employees or employees of civil service. This concurs with the findings of Wati J in Aseri Tuicakau and Nunia Bolavatu –v- Chief Mediator and Permanent Secretary of Public Service Commission [2021] FJHC 102; ERCC 16 of 2016 (17 February 2021) in which it was held that PSC, which was also established under the Constitution, falls under the ambit of the term of Government as an Employer.
22. Therefore if I draw my mind to section 185 of the Employment Relations Act 2007 as amended in 2015, defines essential services and industries to include the 'Government'.
23. Furthermore in section 185 of the Employment Relations Act 2007 as amended in 2015 also refers the word 'employer' to include the Government and the definition of 'employment grievance' to include a dismissal or termination of a worker.
24. On this basis, the correct procedural approach for an employment grievance which entails an Essential Service including employees of the Government are the provisions set out in section 188 of the Employment Relations Act 2007.

Did the Plaintiff/Respondent comply with the procedures in section 188 of the Employment Relations Act 2007?

25. Section 188 (3) and (4) of the Employment Relations Act 2007 sets out the procedures appropriate for an employment grievance for an Essential Service provide and requires –

(4) *Any employment grievance between a worker and employer in essential services and industries that is not a trade dispute shall be dealt with in accordance with part 13 and part 20, provided however that any such employment grievance must be lodged or filed within 21 days from the date in which the employment grievance first arose, and –*

(a) *where 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 or 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 the worker under this Promulgation.'*

26. The Plaintiff/Respondent lodged her employment grievance on 27 January 2023 in the Employment Relations Court after having withdrawn her claim on 20 January 2023 from the Employment Relations Tribunal after having lodged there on 6 June 2022. The termination of her contract occurred on 20 May 2022.
27. The requirement to comply with timelines for employment grievances goes to the substance of the application. Essential Service providers are the backbone of the country's infrastructural services as well as, as is in this case, government machinery. Trade disputes as well as employment grievances provide procedural requirements in order to ensure that the Court or Tribunal deals with the proceedings swiftly and in a timely manner.
28. In this instance, the grievance was lodged close to 7.5 months after the termination of her employment. The Court finds that for all intents and purpose, the grievance was lodged out of time.
29. Despite the Plaintiff/Respondent lodging their grievance in the Tribunal within time, the fact that they withdrew and opted to lodge in the Employment Relations Court rendered the application outside of the statutory timelines.
30. In Aseri Tuicakau and Nunia Bolavatu –v- Chief Mediator and Permanent Secretary of Public Service Commission (Supra) Wati J held that the Chief Mediator acted correctly in refusing the application for mediation as the application was lodged out of time.

31. The law does not empower this Court to enlarge time. Therefore the failure to lodge within time renders the grievance of the Plaintiff/Defendant out of time.
32. The failure of Counsel to properly advise the Plaintiff/Respondent cannot in any way regularize their application pending before this Court. It is not an excuse to be ignorant of the law and its application. It would be advisable for Counsels to be vigilant of the legal requirements where employment grievances arise for any worker, more particularly for Essential Service Providers.

Is this Application an abuse of Process?

33. The Defendant/Applicant contends that the failure of the Plaintiff/Respondent to lodge within the requisite timeline is an abuse of process and therefore falls squarely within the grounds of Order 18 r 18 (1) (d) of the High Court Rules.
34. In accordance with the guideline judgement by Kirby J in Len Lindon –v-Commonwealth of Australia (No.2) [1996]HCA4; (1996) 136 ALR 251 (1996) 70 AJLR 541 (6 May 1996) the Court considered the Claim.
35. The Court finds that because the application was not lodged within the mandatory timelines, the matter now falls outside of the ambit of the provisions of section 188 (4) of the Employment Relations Act 2007 and therefore is indeed an abuse of courts processes.

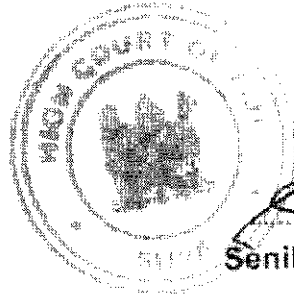
Costs

36. Given the application and the manner in which the matter it was dealt with, the court will impose costs against the Plaintiff/Applicant.

Orders of the Court:

37. The Court orders as follows:
 - (i) *That this application be struck out for abuse of court process in accordance with Order 18 r 18 (1) (d) of the High Court Rules;*

(ii) That costs be awarded to the Defendant/Applicant to the sum of \$750.




Senileba LWTT Levaci

JUDGE

High Court – Suva

Thursday, 20th July, 2023