

**IN THE HIGH COURT OF FIJI AT SUVA**  
**EMPLOYMENTS TRIBUNAL**

ERCC Action No. 08 of 2024

**BETWEEN:**        **SEMIJI GADE** of 11 Nawame Rd, Tacirua East, Suva in the  
Republic of Fiji, Retired Captain of the Fiji Military Force.

**PLAINTIFF**

**AND:**            **REPUBLIC OF THE FIJI MILITARY FORCES** of Berkley  
Crescent, Suva, Fiji.

**DEFENDANT**

**Before:**        Hon. Mr. Justice Deepthi Amaratunga

**Counsel:**        Ms. Wati S. for the Plaintiff

Ms. Drau R. for the Defendant

**Date of Hearing:** 2.9. 2024

**Date of Judgment:** 9.9.2024

**JUDGMENT**

## INTRODUCTION

- [1] Plaintiff is a retired military personnel and he was engaged on contract after retirement. This action is relation to the termination of the said contract by Defendant invoking original jurisdiction of Employment Relation Court (ERC).
- [2] Defendant filed summons for strike out in terms of Order 18 rule 18 (1) (a) of High Court Rules 1988, read with Section 3(2) of Employment Relations Act 2007 (ERA) and or Section 52 of Fiji Military Force Act 1949 (FMFA).
- [3] Plaintiff relies on Section 7 of the Constitution of Republic of Fiji (the Constitution) and also Article 4 of Termination of Employment Convention 1982 which is known as ILO Convention 158 of 1982. Both the Constitution as well as ILO Convention 158 of 1982 allows a state to exclude or impose restrictions to the provisions of the Convention by clear provisions contained in statutes.
- [4] The issue before the court is jurisdiction of Employment Relation Court (ERC) as Plaintiff had invoked original jurisdiction of ERC in this action for termination of contract of employment by Defendant.

## Jurisdiction for 'Employment Grievance' of Military Personnel

- [5] Plaintiff filed this action invoking the original jurisdiction in terms of ERA for dismissal through termination of his contract after retirement.
- [6] Section 3 of ERA refers to the Application of the said statute,  
3.—(1) Subject to subsection (2), this Act applies to all employers and workers in workplaces in Fiji, including the Government, other Government entities, local authorities, statutory authorities and the Sugar Industry.  
**(2) This Act does not apply to members of the Republic of Fiji Military Forces, Fiji Police Force and Fiji Prisons and Correction Services.**  
(Emphasis added)

[7] Section 3 of ERA excludes jurisdiction of the court to application of ERA, to members of Republic of Fiji Military Forces. So Plaintiff cannot invoke jurisdiction of ERC against Defendant for termination of his contract of employment after retirement.

[8] Plaintiff had purportedly invoked the original jurisdiction of the court under ERA, being a member of Republic of Fiji Military Force on contract basis after retirement and the termination of the contract by Defendant. Defendant had sought to strike out the action *inter alia* for want of jurisdiction.

[9] “Section 20 of the Constitution states

*‘Employment relations*

20.—(1) *Every person has the right to fair employment practices, including treatment and proper working conditions.*

- (2) Every worker has the right to form or join a trade union, and participate in its activities and programmes
- (3) Every employer has the right to form or join an employers’ organization, and to participate in its activities and programmes.
- (4) Trade unions and employers have the right to bargain collectively.
- (5) **A law may limit, or may authorize the limitation of, the rights mentioned in this section—**
  - (a) in the interests of national security, public safety, public order, public morality, public health or the orderly conduct of elections;
  - (b) for the purposes of protecting the rights and freedoms of others;
  - (c) for the purposes of imposing restrictions on the holders of public offices;
  - (d) for the purposes of regulating trade unions, or any federation, congress, council or affiliation of trade unions, or any federation, congress, council or affiliation of employers;
  - (e) for the purposes of regulating collective bargaining processes, providing mechanisms for the resolution of employment disputes and grievances, and regulating strikes and lockouts; or

- (f) for the purposes of regulating essential services and industries, in the overall interests of the Fijian economy and the citizens of Fiji”.

[10] The Bill of Rights allows restrictions as to certain rights. All the rights contained in the Bill of Rights Chapter in the Constitution are not absolute as some are qualified or restricted or limited depending on the type of right and factors affecting it. Limitations are allowed as all international conventions are not ‘one fits all’. Depending on circumstances some of the provisions in such qualified rights can be restricted in nondiscriminatory and clear statutory provisions.

[11] Section 20 of the Constitution recognizes ‘Employment Relations’ and right to enjoy ‘fair employment practices’, but by statute such rights can be restricted or limited including restriction to jurisdiction of court under ERA. So, Section 3 of FMFA is in accordance with Section 20(5) of the Constitution.

[12] Section 7 of the Constitution states,

“Interpretation of this Chapter

7. (1) In addition to complying with section 3, when interpreting and applying this Chapter, a court, tribunal or other authority—
  - (a) must promote the values that underlie a democratic society based on human dignity, equality and freedom; and
  - (b) may, if relevant, consider international law, applicable to the protection of the rights and freedoms in this Chapter.
- (2) This Chapter does not deny, or prevent the recognition of, any other right or freedom recognized or conferred by common law or written law, except to the extent that it is inconsistent with this Chapter.
- (3) A law that limits a right or freedom set out in this Chapter is not invalid solely because the law exceeds the limits imposed by this Chapter if the law is reasonably capable of a more restricted interpretation that does not exceed those limits, and in that case, the law must be construed in accordance with the more restricted interpretation.
- (4) When deciding any matter according to common law, a court must apply and, where necessary, develop common law

in a manner that respects the rights and freedoms recognized in this Chapter.

(5) In considering the application of this Chapter to any particular law, a court must, interpret this Chapter contextually, having regard to the content and consequences of the law, including its impact upon individuals or groups of individuals”.

[13] Plaintiff cannot rely on Section 7 of the Constitution to assume jurisdiction of ERC which is expressly excluded, as all rights contained in Bill of Rights Chapter of the Constitution is not absolute and restrictions can be imposed by statutory provisions as to certain rights and Section 20 of the Constitution expressly allows such restrictions by law.

[14] So the reliance of Section 7 of the Constitution and Article 4 of Termination of Employment Convention 1982 cannot be accepted to override unambiguous Section 3 of ERA. There is a requirement to interpret said provision in terms of Article 4 of Termination of Employment Convention 1982, but Article 2 of the said Convention allows restrictions by the parties to the said instrument. Article 2 of the Convention reads<sup>1</sup>,

**“Article 2**

1. This Convention applies to all branches of economic activity and to all employed persons.

2. A Member may exclude the following categories of employed persons from all or some of the provisions of this Convention:

(a) workers engaged under a contract of employment for a specified period of time or a specified task;

(b) workers serving a period of probation or a qualifying period of employment, determined in advance and of reasonable duration;

(c) workers engaged on a casual basis for a short period.

3. Adequate safeguards shall be provided against recourse to contracts of employment for a specified period of time the aim of which is to avoid the protection resulting from this Convention.

---

1

[https://normlex.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_INSTRUMENT\\_ID:312303#:~:text=A%20worker%20whose%20employment%20is,employment%20during%20the%20notice%20period.](https://normlex.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312303#:~:text=A%20worker%20whose%20employment%20is,employment%20during%20the%20notice%20period.)

International Labour Organisation website –labour standards /NORMLEX –Information System on International Labour Standard C158 - Termination of Employment Convention, 1982 (No. 158)(9/9/2024)

4. In so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organisations of employers and workers concerned, where such exist, to exclude from the application of this Convention or certain provisions thereof categories of employed persons whose terms and conditions of employment are governed by special arrangements which as a whole provide protection that is at least equivalent to the protection afforded under the Convention.

5. In so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organisations of employers and workers concerned, where such exist, to exclude from the application of this Convention or certain provisions thereof other limited categories of employed persons in respect of which special problems of a substantial nature arise in the light of the particular conditions of employment of the workers concerned or the size or nature of the undertaking that employs them.

6. Each Member which ratifies this Convention shall list in the first report on the application of the Convention submitted under Article 22 of the Constitution of the International Labour Organisation any categories which may have been excluded in pursuance of paragraphs 4 and 5 of this Article, giving the reasons for such exclusion, and shall state in subsequent reports the position of its law and practice regarding the categories excluded, and the extent to which effect has been given or is proposed to be given to the Convention in respect of such categories.”

[15] A qualified right contained in Bill of Rights can be restricted in its application in nondiscriminatory clear statutory provision. It needs to be proportionately applied not exceeding to the limits necessary. A right of individuals needs to be balanced with the needs of society as a whole. There may be restrictions based on conditions or requirements of the state such as national security, public health or safety of others but the proportionality of such restriction is required. Under these qualifications exclusion of military personnel from domestic employment courts are justified considering discipline and national security, which are valid reasons for restrictions in terms of Section 20 of the Constitution. Section 20 (5) of the Constitution allows restriction of the Right of Employment Relation relating to Defendant.

[16] Section 3 of FMFA excludes jurisdiction of ERA to Plaintiff to seek redress under ERA from Defendant. Plaintiff cannot invoke jurisdiction under ERA for termination of his contract in terms of Section 3 (2) of ERA.

[17] Defendant had relied on Section 52 of FMFA as an alternate provision to strike out the cause of action. The objection is mutually exclusive. Section 52 of FMFA applies when there is jurisdiction, but in my mind when jurisdiction of ERC is excluded Section 52 cannot be applied for an action under ERA.

[18] I do not have to venture on this issue as Section 52 of FMFA has no application to this this action as Plaintiff lacks jurisdiction to invoke original jurisdiction of ERC in this action.


### **CONCLUSION**

[19] Plaintiff's 'employment grievance' is excluded from jurisdiction of ERC in terms of Section 3(2) of ERA. This restriction is allowed in the Constitution as well as in Termination of Employment Convention 1982. So this action is struck off for want of jurisdiction. Considering the circumstances of the case no cost awarded.

### **FINAL ORDERS**

- a. Writ of summons struck off and action dismissed.
- b. No costs.



  
.....  
Deepthi Amaratunga  
Judge

At Suva this 09<sup>th</sup> day of September, 2024.

**Solicitors**  
**Lazel Lawyers**  
**Republic of Fiji Military Forces – Legal Services**