IN THE HIGH COURT OF FIJI AT SUVA

CIVIL JURISDICTION

CASE NUMBER:	**HBC 260 OF 2024**
BETWEEN:	**SEMIJI GADE**
	PLAINTIFF
AND:	**REPUBLIC OF THE FIJI MILITARY FORCES**
	DEFENDANT
Appearances:	*Mr. Sailosi Lavo for the Plaintiff.*
	Mr. Setefano Komaibaba for the Defendant.
Date/Place of Judgment:	*Friday 21 March 2025 at Suva.*
Coram:	*Hon. Madam Justice Anjala Wati.*

RULING

(Application to strike out claim)

A. ***Catchwords:***

Whether an action for unlawful and unfair dismissal can be brought under the common law in the civil jurisdiction if it was precluded under the Employment Relations Act and struck out earlier for want of jurisdiction of the Court?

B. ***Cases:***
   1. ***Suva City Council v Setavana Saumatua Civil Appeal No. ABU 056 of 2020 (Delivered on 28 July 2023).***

C. ***Legislation:***
   1. ***Employment Relations Act 2007 ("ERA"): s. 3(2).***

The Application

1. The plaintiff has brought a common law action for unlawful and unfair dismissal under the civil jurisdiction.

2. The defendant has filed an application to strike out the claim on the grounds that it is abuse of the process of the court to file an action in civil jurisdiction when the same action was filed in the

Employment Relations Court and struck out by his Lordship Justice Amaratunga on the grounds that the ERA, by s. 3(2), did not apply to the defendant and as such the Employment Relations Court did not have jurisdiction to hear the claim.

Issue

3. The issue before this court is whether the plaintiff can file an employment action in the civil division when his claim was struck out for want of jurisdiction under s. 3(2) of the ERA?

Law and Analysis

4. Mr. Komaibaba says that when the Employment Relations Court struck out the claim for want of jurisdiction, the plaintiff's right to challenge that decision lay in Court of Appeal. It was argued that since Employment Court is a division of the High Court, filing of the same action in the Civil Division is an abuse of the process of the court as both the Employment Court and Civil Court are courts of parallel jurisdiction.

5. Mr. Komaibaba argued that if one court does not have jurisdiction, the court of the same level cannot hear the claim if filed in another division.

6. There is no doubt that by s. 3(2), the ERA does not apply to the defendant, which means that no claims under the ERA can be filed against the defendant.

7. This does not mean that the plaintiff cannot file a claim for dismissal or an employment action in the civil jurisdiction under the common law. There is nothing in the ERA and the High Court Rules precluding a common law action for unlawful and unfair dismissal against the defendant in the civil jurisdiction.

8. There was no need for the plaintiff to appeal the decision to the Court of Appeal. The Employment Relations Court was correct in striking the claim out on s. 3(2) of the ERA. The plaintiff has accepted that finding and is not aggrieved with it. Why should it then challenge the decision? The plaintiff's interest is in bringing a claim against his dismissal and he wants to challenge that. He can do so in the civil division.

9. The Court of Appeal was faced with a similar issue in the case of ***Suva City Council v Setavana Saumatua Civil Appeal No. ABU 056 of 2020 (Delivered on 28 July 2023):***

10. The decision of the Court of Appeal in the above case was in respect of s.30 of the Essential National Industries (Employment) Decree No. 35 of 2011. The issue in particular was whether an action could be brought in the civil division if it was precluded under the ERA pursuant to the *Essential National Industries (Employment) Decree No. 35 of 2011*. A similar issue is before me.

11. In the Court of Appeal, the appellant had contended that any action instituted by an employee in a designated corporation was caught by s. 30 of the Essential National Industries (Employment) Decree No. 35 of 2011 and so no action could be brought in the Employment Relations Court, under the ERA and the Civil Division of the High Court.

12. The Court of Appeal made the following pertinent findings:

> *"22. Section 30(2) only applies to actions that had been instituted under or involved the ERA before the commencement date of the* ***ENI****. The language in the section is clear and unambiguous. If it was the intention of the legislature that all actions including civil actions were to be caught by section 34 then this would have been stated in the provision however section 34 does not say this. This section only terminated proceedings, claims challenges or disputes that had been instituted under or involved the ERA. The Respondent's claim is a common law action for breach of contract instituted in the High Court Civil jurisdiction.*
>
> *23. The ERA does not remove the jurisdiction of High Court to hear claims involving employment contracts. The Appellant contends that the Respondent's employment with the Appellant was governed by her contract of employment and the ERA. The contract does not say this. All it says is that the contract shall be construed and interpreted in accordance with the laws of Fiji which does not mean that it is governed by the ERA. The Appellant further contends but there was nothing in the Contract that provided that the terms and conditions of the contract would be governed by common law. This is a strange argument. The Contract provided that the contract would be construed and interpreted in accordance with the laws of Fiji. It is unquestionable that the laws of Fiji recognize the common law.*
>
> *24. The Appellant argues that the Employment Relations Court was created and provided for in the ERA to deal with employment matters. Therefore there is no need to invoke the general jurisdiction of the High Court for employment matters. I do not agree with this contention.*
>
> *25. The jurisdiction of the High Court in such matters has not been excluded by the ERA. It is a claimant's choice whether to institute an action under the ERP or under the Common Law. As the learned counsel for the Respondent pointed out at the hearing of this appeal there may be causes of action and remedies available under either of the processes that are not available under the other. The decision where to institute an action depends on the facts and circumstances of each case. For the reasons expressed herein, I determine that the Respondent was not precluded from bringing an action in common law in the High Court for breach of her employment contract...*

37. *The appellant submits that the effect of the section precludes not only cases under the ERA but also under any other law. I understand from this that their argument is that the section has the effect of precluding the respondent's claim in common law. I cannot see how this can be argued"*

13. The present case before me is filed in the Civil Court. Like the Court of Appeal has stated in the above case, there is nothing in the law including the ERA that precludes an employment action against the defendant in the civil jurisdiction.

14. As such the application for striking out has no basis and ought to be dismissed.

Final Orders

15. In the final analysis I dismiss the application to strike out the plaintiff's claim. There shall be costs against the defendant in the sum of $1,500 to be paid within 14 days.

16. I grant the defendant 21 days to file its statement of defence. The plaintiff shall have 14 days for reply. I will give further directions for the progress of the case on the next fixture.

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Hon. Madam Justice Anjala Wati

Judge

21.03.2025

HIGH COURT OF FIJI SUVA

To:

1. ***Lazel Lawyers for the Plaintiff.***
2. ***Army Legal Services for the Defendant.***
3. ***File: Suva HBC 260 of 2024.***