IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

ORIGINAL JURISDICTION

CASE NUMBER:	**ERCC 8 of 2015**
BETWEEN:	**DAMODARAN NAIR**
	APPLICANT
AND:	**FIJI PUBLIC SERVICE ASSOCIATION**
	RESPONDENT
Appearances:	*Mr. Nair in Person as the Applicant.*
	Ms. M. Rakai for the Respondent.
Date/Place of Oral Judgment:	*Wednesday 30 March 2016 at Suva.*
Date/Place of Written Judgment:	*Thursday 8 September 2016 at Suva.*
Coram:	*Hon. Madam Justice A. Wati.*

RULING

Catchwords:

Employment Law – Application to strike out the proceedings- is it necessary for a party having employment grievance and intending to file proceedings in the ERC, to first file the matter in the Mediation Unit- manner of initiating proceedings in the ERC- irregularity in the affidavit can be used with the leave of the Court and the irregular parts of the affidavit can be expunged.

Legislation:

1. *The High Court Rules 1988 ("HCR"): Order 28 Rule 10.*
2. *The Employment Relations Promulgation 2007 ("ERP"): ss. 110(3); 211(1) (k); 211(2) a; 220 (1) (h); 220(4); and 238(2) (b).*
3. *Employment Relations (Administration) Regulations 2008 ("ERAR"): Regulations 9 (2) (b); 9 (3).*

Cause

1. The respondent seeks that the applicant's cause be struck out on the grounds that it is an abuse of the process of the Court.

2. By an originating summons of 6 October 2015, the applicant requires the Court to make a finding on whether the termination of his employment was lawful and fair. The specific orders sought are:

   (a). ***A declaration that the Executive Board and the National Council of the Respondent that convened on 12 September 2015 and decided to terminate the employee was unlawfully constituted.***

   (b). ***A declaration that the decision to terminate the employee is unlawful and ultra vires.***

   (c). ***A declaration that the decision to terminate the employment of the applicant was made in breach of the principles of natural justice and the process followed lacked impartiality and independence.***

   (d). ***A declaration that the application of the Human Resources Policy that has been relied upon in instituting the disciplinary action against the employee is discriminatory, unlawful and unjustified.***

   (e). ***An order to remove the said decision of termination made by the employer and to reinstate the employee without any further loss of benefits and entitlements.***

   (f). ***An order in the alternative directing the respondent to compensate the applicant of all the lost wages and benefits from the date of his unlawful and unjustified suspension until the expiry of his employment contract.***

3. The originating summons was supported by an affidavit which sets out the basis of the application.

Employment Background

4. The affidavit in support of the originating summons sets out the background of the employment history between the parties. I will outline the same in brief.

5. Mr. Damodaran Nair was employed by the respondent on 21 July 2008. He started work as a Temporary Clerk. During his employment, he progressed through various ranks until he was appointed as the Principal Industrial Officer.

6. At the time of the termination, the employee was on an annual salary of $39, 452 per annum.

7. The employee says that he was a member of the Non-Governmental Trade Union Employees Association ***("NGOTUEA")***. He says that the NGOTUEA and the employer had entered into a Collective Agreement ***("CA")*** on 31 March 2005. The employee says that he was subject to the CA as well as this was reaffirmed on 10 December 2008 by a Memorandum of Agreement signed by both parties.

8. The employee says that pursuant to the contract of employment, his retirement age was 60 years but he was terminated on 14 September 2015.

9. The employee was initially suspended on 18 July 2015. On 7 August 2015, the employer levied 4 disciplinary charged against the employee. Subsequently, the employee responded to the allegations but was later terminated.

Grounds/Submissions

10. The respondent has basically raised four grounds why the cause should be struck out. The first is that the originating summons cannot be filed in the Employment Relations Court ***("ERC")*** without the matter being first filed in the Mediation Unit ***("MU")***.

11. Ms. Rakai says that the matter ought to have been brought before the MU first. Since the first step has not been complied with, the application ought to be struck out. The filing of the matter in the ERC instead of the MU is an abuse of the process of the Court.

12. Expanding on the first ground, Ms. Rakai stated that Mr. Nair is an experienced unionist and he ought to know the law that the matter cannot be filed in the ERC initially.

13. The second ground relied upon is that the originating summons is not the correct procedure as there are substantial dispute of facts. The applicant ought to have filed a writ of summons.

14. The third ground is that the originating summons fails to identify the cause of action against the employer.

15. The fourth ground is that the applicant has provided statements of opinions and made references to law in the affidavit which makes the affidavit unreliable. It was specifically alleged that paragraphs 6 and 24 provides statements of opinions and that paragraphs 13, 14, 17, 19, 25 and 28 contains statements of law.

16. The respondent also argued that the applicant will not be prejudiced if the application is dismissed as the applicant will have a chance before MU in any event to see if the matter is settled.

17. Mr. Nair argued that if he filed his matter in the MU, failing mediation, the MU would have sent the matter to ERT for determination. Mr. Nair said that one of the remedies that he seeks is lost wages as a result of the termination. If that were to be awarded, then the ERT does not have jurisdiction to award his remedy beyond $40,000. He would then be prejudiced if his matter is sent to ERT by the MU for determination as his claim is beyond $40,000.

18. Mr. Nair further argued that he has the right to bring to the ERC his employment grievance under s. 220(h) of the ERP. It was argued that if a party's claim exceeds $40,000, then there is no compulsion by law to have the matter first mediated by the MU.

19. Mr. Nair also argued that the issues can be dealt with on the affidavit as the facts can be outlined in the affidavits and proper findings made. Mr. Nair stated that there is no dispute of facts that has been shown to give validity to the argument raised by the respondent.

Law and Analysis

20. The respondent's first ground of argument is that the filing of the originating summons is an abuse of the process of the Court as the application before the Court is an employment grievance and it should have been filed in the MU first.

21. The contention of the respondent is based on s. 110(3) of the ERP. The section states that ***"all employment grievances must be first referred for mediation services set out in Division 1 Part 20".*** This provision when read on its own, is confusing and gives the respondent some basis to present the argument that even this matter should have been first referred to the MU. However, the parties and the Court cannot just make a determination based on this section alone. It has to examine all the provisions of the ERP, the tenor and the spirit of the legislation as a whole to make a finding on whether a party who intends to invoke the original jurisdiction of the ERC should also have the matter referred to the MU first.

22. In my finding, and I will, speak of the reasons in a while, a party who wishes to file a cause under the original jurisdiction of the High Court pursuant to s. 220 of the ERP should not refer the matter to the MU first. A party is entitled to file the cause straight away in the ERC.

23. If a party who has an employment grievance wishes to invoke the jurisdiction of the ERT, then that party should the start the process in the MU. The party's choice will depend on whether the ERT has the jurisdiction to hear the matter. If the answer is in the affirmative then a party will need to start the process of filing the employment grievance in the MU. The basic reason is that if a mediation fails, the mediator only has powers to send the cause to the ERT and not the ERC as per Regulation (2) (b) and 9 (3) of ERAR.

24. If the Mediator can only send the matter to the ERT, a party whose claim is beyond $40,000 will then end up before the ERT when it has no jurisdiction to hear the claim. A party will then have to either ask for the matter to be withdrawn or simply have it struck out on the grounds that the ERT has no jurisdiction to hear the claim. A party will not be able to ask for the transfer of the cause as transferring a matter means to exercise jurisdiction in the case.

25. If a party withdraws a cause for want of jurisdiction then the ERT will have to grant leave first which will then entitle the other party to apply for costs. Arguably, there may not be any costs when a matter is simply struck out on the grounds of lack of jurisdiction. The purpose of the withdrawal application or the striking out will be to enable the party to file the matter in the ERC.

26. In essence then, if s. 110(3) were to be mandatory in causes which fall under the jurisdiction of the ERC, then the legislative provision is prejudicial and not workable. It will only delay in finalization of a cause when one of the objects of the ERP is to provide an effective and efficient settlement of employment related disputes.

27. I am fortified in my view that the MU does not have powers to send cases to the ERC when mediation fails upon s. 211 which sets out the jurisdiction of the ERT and s. 220 which sets out the jurisdiction of the ERC.

28. S. 211 (1) (k) gives the ERT specific powers to adjudicate on matters referred to it by the Mediation Services or any party to the mediation. No such power or jurisdiction exists in s. 220. This gives a clear indication then that a party who wishes to file proceedings in the ERC should not initiate proceedings in the MU under s. 110(3) of the ERP. If they so do, they would have chosen the wrong track which would mean that they will either have to limit their claim to the jurisdiction of the ERT or file fresh proceedings in the ERC after being given leave to withdraw the matter. Leave, arguably, may or may not be granted, and a party can be forced to then limit his or her claim to that of the jurisdiction of the ERT.

29. S. 211(2) (a) very clearly states that the ERT has power to adjudicate matters within its jurisdiction relating to claims up to $40,000. In this case, one particular relief sought is wages and benefits lost from the date of suspension until the expiry of the contract. The employee's annual salary was almost $40,000 and on the face of the facts, his claim would definitely exceed $40,000. This is the reason why he chose to file the proceedings in the ERC.

30. The ERC has original jurisdiction to hear and determine an action founded on an employment contract pursuant to s. 220 (1) (h) of the ERP. Based on that, the applicant chose to file the proceedings in the ERC and the procedure cannot be flawed.

31. I find that the argument that the applicant should have exhausted the services of MU first not applicable to causes which are to be filed in the ERC.

32. The next argument is that the originating summons is not the correct procedure to file the case and that a writ action is sufficient. The arguments extends on the basis that there are disputes of facts which will require oral evidence.

33. The respondent is merely saying that the facts are disputed without filing an affidavit in opposition to the affidavit in support of the originating summons. The respondent is saying that oral and documentary evidence will be required in this case to resolve the dispute. I am unable to, at this stage, give any weight to the respondent's argument that the dispute in facts are such that it cannot be dealt with on the affidavits.

34. The respondent must first file an affidavit responding to assertions in the affidavit in support and annex all relevant documentary evidence that it wishes to rely on. The applicant will have a right to reply and clarify issues. Once the filing of the affidavits are complete then I will be able to assess which facts are disputed, the extent of the dispute, whether findings can be made on affidavits, whether further written affidavits will resolve the issue and whether oral evidence is necessary to any extent and the proper directions that ought to made.

35. In absence of a complete factual position, the application cannot be struck out. Even if oral evidence is required this Court can always order witnesses to give evidence. The Court will not strike out the originating summons because that is a very strong and severe action that will deprive the applicant from having his matter litigated in Court **on an expedited basis.**

36. There is no provision in the ERP which states the manner in which proceedings must be originated in the ERC. In absence of any such procedure, the ERC can rely on the High Court Rules 1998. This is provided for in s. 238(2) (b) of the ERP.

37. Order 28 Rule 10 of the HCR gives the Court powers to call for oral evidence on originating summons unless the matter is disposed of. In this case, even the full information is not before the Court for it to decide the extent of oral evidence necessary to resolve the disputed facts if any.

38. The applicant is claiming that he was unlawfully and unfairly dismissed. There is no provision which specifically requires that an action of this nature can only be begun by a writ of summons and no other procedure.

39. S. 220(4) of the ERP states that no proceeding before the Court may be held to be invalid for want of form or to be void or in any way vitiated by reason of an informality or error in form. Given that provision, the application for striking out is not properly founded on the grounds that the correct procedure ought to have been a writ action. The reason why such flexibility is allowed in employment matters is that the Court must concentrate on the real employment issue rather than being technical about rules which many parties who are dismissed from employment may not be able to fully comply with in respect to the form of proceedings. The dismissed party may not have the requisite financial capacity to engage a lawyer to observe the rules strictly. The orders for strict compliance of rules on form of proceedings will lose sight of the real dispute that exists between the parties.

40. Proceedings which has errors in form can always be corrected or directions given to cure the defect. It is not the same as a defect in substance that affects the validity of the proceedings and makes it a nullity.

41. There is also no prejudice caused to the respondent because if there is a need for oral evidence, that opportunity would be provided to the parties but like I have said, it is too early to make that determination without complete affidavits before the Court.

42. I am compelled to outline the procedure that is used to bring employment grievances in the ERT. The procedure is initiated by filing a form only. The employee has to provide his or her details and the details of the employer and outline the details of the problem. In outlining the detail, the employee has to explain what caused the problem. Based on that the employer is asked to justify the termination at the hearing.

43. In the current case, the employee has explicitly outlined the nature of the problem based on which he was terminated and why he feels the termination is not justified. There is much more information in this case that an employee will ordinarily provide if a form was filed in the ERT.

44. I do not find that the employer will be prejudiced in any way if the action is begun by an originating summons. The onus is on the employer to justify the termination.

45. This then brings me to the issue that the employer says that there is no cause of action against it. The cause of action against the employer is clearly outlined to be unlawful and unfair termination and the reasons are also outlined. The employer has to justify the termination in the cause before the Court. I cannot fathom why the respondent has failed to analyze what the cause of action is.

46. The respondent has also raised that paragraphs 6 and 24 of the applicant's affidavit contains opinions. I do not find these paragraphs to contain opinions. It basically states the circumstances surrounding his employment, his membership with a union and what guided his terms and conditions of the employment. These are matters that are pertinent in deciding the grievance before the Court.

47. The remaining paragraphs 13, 14, 17 19, 25 and 28 mentions how the applicant says the decision of the employer to terminate him was illegal, unlawful and unjustified, lacked impartiality and independence and the remedy he seeks from the employer. These paragraphs also mention the provisions of the ERP which is breached and the manner of the breach. It is trite law that Legal submissions are not to be stated in the affidavit of a party but be properly addressed in the submissions. The applicant can still argue the matter without reference to these provisions without stating the same in the affidavit. I find that the reference to law in the affidavit is not proper. However these are not grounds to strike out an application. The parts of the affidavit can always be expunged and the remaining parts used to argue the cause.

48. I find that there is no tenable basis on which the application for striking out can be granted. The respondent's application has not only incurred expenses for the applicant but has also consumed time. If the respondent filed a proper affidavit, the matter could have been dealt with more efficiently and proper directions could have been given on whether an oral hearing would be needed. I am certain that by now, the final cause would have been ready for hearing if not already heard. It is only justified that the respondent pays the costs of the proceedings.

Orders

49. In the final analysis, I order as follows:

(a) The application for striking out is dismissed and the respondent employer is ordered to pay costs of the interlocutory proceeding in the sum of $1,500 within 21 days.

(b) The respondent must file an affidavit in response to the originating summons within 14 days.

(c) Thereafter the applicant must file reply to the response within 14 days.

(d) Once all the affidavits are in order, the Court will give further directions on the hearing of the matter, that is, whether further materials are needed and oral hearing necessary.

(e) The applicant is given leave to adduce the affidavit without the paragraphs (13, 14, 17 19, 25, 28 and any others) containing legal arguments. These matters can be addressed in the submissions of the applicant.

Anjala Wati
Judge
08.09.2016

To:

1. *Applicant in Person.*
2. *Messrs Sherani & Company for the Respondent.*
3. *File: Suva ERCC 8 of 2015.*