

IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

ORIGINAL JURISDICTION

CASE NUMBER: ERCC 18 of 2020

BETWEEN: NIKHAT SHAMEEM

PLAINTIFF

AND: **FIJI HIGHER EDUCATION COMMISSION [FHEC]**, a
user name of pseudonym, for **HIGHER EDUCATION
COMMISSION.**

DEFENDANT

Appearances:

Mr. R. A. Singh for the Plaintiff.

Mr. N. Prasad and Ms. P. Verma for the Defendant.

Date/Place of Judgment:

Wednesday 01 June 2022 at Suva.

Coram:

Hon. Madam Justice Anjala Wati.

RULING

A. Catchwords:

Employment Law – Does the Court have jurisdiction to hear the claim by the plaintiff which seeks to challenge the decision of the employer to terminate the plaintiff from her employment: a decision made under the provisions of the Higher Education Act 2008 or is the jurisdiction ousted by s. 173 (4) (d) of the Constitution of Fiji – Does lack of jurisdiction mean that there is no cause of action, a claim is frivolous or vexatious or is otherwise an abuse of the process of the Court - is the defendant incorrectly named in the proceedings?

B. Legislation:

1. *Constitution of Fiji: s. 173 (4) (d).*

2. *Higher Education Act 2008: s. 12 (3) and (4).*
 3. *Interpretation Act 1967: s. 44.*
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Cause

1. The plaintiff and the defendant had been in an employment relationship until she was terminated from work in June 2020. Her substantive claims concerns issues she faced during her employment and the legality of termination of her work.
2. The plaintiff was employed as a Deputy Director and Acting Interim Director of Higher Education Commission. She was suspended from her duties in February 2020 and later terminated.
3. Amongst other reliefs, the plaintiff seeks to challenge her suspension from employment, the investigation against her for various allegations and the dismissal from the employment. The matter is at the pleadings stage and the defendant has filed an application to strike out the claim on the following grounds:
 1. *That the defendant has been incorrectly named in the proceedings. There is no legal body known as Fiji Higher Education Commission but Higher Education Commission only.*
 2. *That the Court does not have the jurisdiction to hear the claim against the decision of the employer taken under the Higher Education Act 2008 to suspend, investigate and terminate the plaintiff in that the Constitution of Fiji by s. 173 (4) (d) ousts the jurisdiction of the Court.*

3. *Since the Court does not have jurisdiction to hear the claim, it follows that the claim does not disclose any reasonable cause of action, is frivolous or vexatious, or is otherwise an abuse of the process of the Court.*

4. Grounds 2 and 3 are inter-related as both the grounds rely on the fact that the Constitution does not permit the decision of the Higher Education Commission to be challenged in Court. The application for striking out is opposed.

Submissions/Law and Analysis

5. The most important issue in this matter is to determine whether the Court has jurisdiction to hear the proceedings filed by the plaintiff. The crucial provision based on which the issue was raised is s. 173(4) (d) of the Constitution of Fiji. The section in its material part reads:

“173(4) Notwithstanding anything contained in this Constitution, no court or tribunal (including any court or tribunal established or continued in existence by the Constitution) shall have the jurisdiction to accept, hear, determine, or in any other way entertain, or to grant any order, relief or remedy, in any proceeding of any nature whatsoever which seeks or purports to challenge in question...

(d) any decision made or authorized, or any action taken, or any decision which may be made or authorized, or any action which may be taken, under any Promulgation, Decree or Declaration, and any subordinate laws made under any such Promulgation, Decree or Declaration (including any provision of any such laws), made or as may be made between 5 December 2006 until the first sitting of the first Parliament under this Constitution, except as may be provided in or authorized by any such Promulgation, Decree or Declaration (including any provision of any such laws), made or as may be made between 5 December 2006 until the first sitting of the first Parliament under this Constitution”.

6. It is very clearly spelt out in the above section that the laws that comes within the ambit of the above provision are the laws made between 5 December 2006 and the first sitting of Parliament (6 October 2014).
7. Is there a timeline for the decisions as well? The above provision encompasses all decisions that are made or that may be made in future. The section does not provide a time period for the decision.
8. The Higher Education Act 2008 was made between the operational periods identified in s. 173(4) (d) of the Constitution. The decision to suspend, investigate and remove the plaintiff was made under s. 12 (3) and (4) of the Higher Education Act as that is the section that empowers the Higher Education Commission to appoint an Acting Director or any other staff of the Commission.
9. Although s. 12 of the Higher Education Act is a specific provision on appointments, by virtue of s. 44 of the Interpretation Act, the same provision is deemed to bestow on the Higher Education Commission the power to suspend and remove the plaintiff.
10. The plaintiff's claim for unlawful suspension, investigation and termination of employment therefore cannot be challenged in Court by virtue of s. 173(4) (d) of the Constitution.
11. With the claim for unlawful suspension, investigation and termination, the plaintiff brings other claims against the employer on issues faced whilst she was in the employment of the defendant. I cannot sever this claim from the rest of the claims in respect of which I have found that I do not have jurisdiction.

12. S. 173(4) (d) prohibits the Court from granting any order in a claim in which it has no jurisdiction. Severing the claim will amount to ordering an amendment and where there is no jurisdiction there cannot be any order for amendment either by consent or by an order of the Court.

13. I therefore find that the Constitution of Fiji ousts the jurisdiction of this Court to hear the action brought by the plaintiff. If there was a provision in the Higher Education Act allowing the employee to bring an action against the employer then the exception in s. 173(4) (d) will be applicable as the section says that if a provision in those laws allows for the bringing of an action against the decision made then an action can be brought and the Court's jurisdiction is not ousted.

14. The plaintiff's counsel argued that s.15 (2) of the Constitution allows for access to courts and tribunals. It does. I do not disagree with that. However, when it comes to the issue of whether s. 173(4) (d) is the overriding provision, the usage of the words in that section itself that "***notwithstanding anything contained in this constitution***", makes it clear that all other provisions are subject to this provision.

15. The plaintiff has also argued that s. 20 of the Constitution states that every person has a right to fair employment practices, including humane treatment and proper working conditions. That is part of the plaintiff's claim which cannot be saved in this proceeding in which I do not have jurisdiction.

16. I was also asked to consider that this is an employment matter and that s. 173(4) (d) does not apply. Section 173 (4) (d) of the Constitution does not provide for any such exception. There have been previous matters in the employment court which have been terminated on the same basis.

17. Mr. Singh also informed me that I have heard cases which may be excluded by s. 173(4) (d) of the Constitution. I have not been shown any such case. In any event, the argument does not grant him any legal basis to ask the Court to go past the mandate in the Constitution.
18. It was further argued by Mr. Singh that I have previously heard an injunction application in this matter and exercised jurisdiction. At the time I heard the application for an ex-parte injunction, I had acted quickly to deal with the urgency of the matter. I was not confronted with the issue on the jurisdiction to deal with the proceedings. I now am and bound to consider the same. I am not functus to deal with the issue. The mere fact that I heard the plaintiff's application before does not permit the Court to continue to exercise jurisdiction in the case.
19. In light of my findings on the issue of jurisdiction, I do not consider it prudent to delve into the ground that the claim does not disclose any reasonable cause of action, is frivolous or vexatious or otherwise an abuse of the process of the Court. However, it is important if I make a brief observation on this issue. This ground is generally not co-related with the ground that the Court does not have jurisdiction to deal with the cause.
20. The ground is only asserted when the Court has jurisdiction to hear the claim. Once the Court has jurisdiction to deal with the matter, it will then examine whether the claim discloses recognizable causes of action, is not frivolous and vexatious or otherwise an abuse of the process of the Court. If the Court does not have jurisdiction to deal with the proceedings, it cannot deal with the claim and examine whether the causes of actions are recognizable in law, is not frivolous and vexatious or otherwise an abuse of the process of the Court.

21. For the sake of completeness, I will very quickly address the issue of the defendant being named wrongly. The plaintiff sues her employer and names it as the Fiji Higher Education Commission a user name or pseudonym for Higher Education Commission. The Higher Education Act establishes a Higher Education Commission as a body corporate capable of suing and being sued.
22. Mr. Prasad argued that the defendant should be named as established under the Higher Education Act. Although the Act establishes Higher Education Commission, the said Commission has always used the name Fiji Higher Education Commission to identify itself as the body established under the Higher Education Act.
23. The Higher Education Commission holds itself out as Fiji Higher Education Commission. It uses letter heads in that name. Its website is in that name. It uses the acronym “FHEC” to indicate that it identifies itself as Fiji Higher Education Commission. It employed and dismissed the plaintiff under that name.
24. I therefore do not find that the defendant has been wrongly named. It is properly indicated in the title action that the body that is sued is the Higher Education Commission which uses the name Fiji Higher Education Commission. I do not find any irregularity or impropriety in the naming of the defendant employer.

Costs

25. The defendant has asked for costs in the matter. In a normal situation, it is entitled to costs. However, this is an employment situation where the plaintiff is now unemployed by the defendant. She is alleging unlawful and unfair dismissal but cannot challenge the decision of the employer in any Court. I find that there should not be any order for costs against her.

Final Orders

26. In the final analysis, I make the following orders:

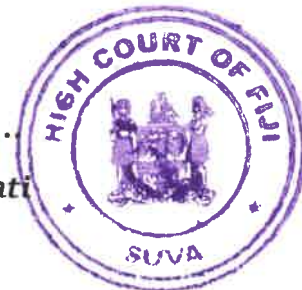
- (a) *The Court does not have jurisdiction to hear and determine this matter.*
- (b) *The proceedings against the defendant is terminated.*
- (c) *Each party shall bear their own costs of the proceedings.*

Anjala Wati

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Hon. Madam Justice Anjala Wati

Judge

01 .06. 2022



To:

- 1. Singh & Singh Lawyers for the Plaintiff.**
- 2. Mitchell Keil Lawyers for the Defendant.**
- 3. File: ERCC 18 of 2020.**