

**IN THE EMPLOYMENT RELATIONS COURT**  
**AT SUVA**

**ERCC No. 03 of 2019**

**BETWEEN** : **KUMAR SAMI GOUNDAR**

**PLAINTIFF**

**AND** : **FIJI REVENUE AND CUSTOMS SERVICE**

**DEFENDANT**

**BEFORE** : **M. Javed Mansoor, J**

**COUNSEL** : **Mr. R. Singh and Mr. T. Low for the plaintiff**  
**Ms. N. Choo for the defendant**

**Date of Hearing** : **16 April 2021**

**Date of Decision** : **01 May 2023**

# DECISION

EMPLOYMENT LAW      *Employment grievance – Essential service industry – Time to lodge grievance – Section 188 (4), Employment Relations Act 2007 – Order 18 rule 18 (1) (d), High Court Rules 1988 – Jurisdiction*

The following cases are referred to in this decision:

1. *Ritesh Singh v Fiji Revenue and Customs Authority* [2019] FJHC 915; ERCC 7.2016 (24 September 2019)
  2. *Setavana Saumatua v Suva City Council* [2020] FJHC 482; HBC 88.2012 (30 June 2020)
  3. *Opetaiia Ravai v Water Authority of Fiji* [2020] FJHC 53; ERCC 13.2018 (7 February 2020)
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1. The issue in this strike out application relates to an employment grievance of a worker employed in the essential service industry, and as to whether it was lodged within time. Although the parties did not raise the matter of jurisdiction, this aspect is considered at the end of this decision.
2. The plaintiff's employment was terminated on 23 November 2017. He lodged an employment grievance on 13 December 2017, within 21 days, the time limit imposed by statute. Subsequently, he withdrew the grievance from the Employment Relations Tribunal. He filed action in this court on 28 February 2019.
3. By summons filed on 14 May 2020, the defendant sought to strike out the plaintiff's statement of claim. The application was filed in terms of Order 18 rule 18 (1) (d) of the High Court Rules 1988. The defendant states that it is an essential service under the Employment Relations (Amendment) Act No. 4 of 2015 and deemed as a designated corporation, and that any employment grievance against it must be filed within 21 days from the date when the employment grievance first arose, in terms of section 188 (4) introduced by the Employment Relations (Amendment) Act No. 4 of 2015. Alternatively, the defendant asked that the hearing of the case be vacated and the action stayed to await the outcome of the appeals in *Ritesh Singh v FRCA*<sup>1</sup>, *Setavana Saumatua v SCC*<sup>2</sup> and *Opetaiia Ravai v Water Authority of Fiji*<sup>3</sup>.

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<sup>1</sup> [2019] FJHC 915; ERCC 7.2016 (24 September 2019)

4. An affidavit supporting the application to strike out was given by Parma Siwan Reddy on behalf of the defendant. The affidavit stated that the plaintiff's claim is statute barred for failing to comply with the mandatory requirement of section 188(4) of the Act. The defendant states that there is no statutory provision enabling the grant of an extension of time to lodge an employment grievance in the essential service industry beyond the 21 days allowed by law.
5. The defendants stated that prior to the enactment of section 188(4) of the Act by amendment of the law in 2015, workers in the essential service industry were not allowed to file employment grievances against their employers. The amendment permitted an employment grievance to be lodged or filed within 21 days. This was done so that grievances could be dealt with expeditiously without hindering the services of the essential service industry.
6. The plaintiff filed an affidavit in response and said that he was employed by the defendant for about 42 years and held various positions. His employment contract was renewed on 16 June 2017. This was to expire on 31 July 2019. When he ceased to be employed in November 2017, he was the director, revenue management, and reported to the defendant's chief executive officer. The plaintiff denied that his claim is statute barred. He stated that he filed his employment grievance within 21 days of his dismissal and withdrew the grievance at the earliest instance as his claim exceeded the jurisdiction of the Employment Relations Tribunal. According to him, the Employment Relations Court is the appropriate forum to hear his claim.
7. Describing the way in which his employment ended, the plaintiff said that he attended a meeting with the chief executive officer on 5 October 2017. At the meeting he was informed of allegations of non-performance. On 20 November 2017, the plaintiff said he was told to retire. He was given time until 22 November 2017 to do so. When he did not retire by the given date, his employment was terminated on the following day. The plaintiff submitted that he withdrew the grievance on the day the case was first called before the

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<sup>2</sup> [2020] FJHC 482; HBC 88.2012 (30 June 2020)

<sup>3</sup> [2020] FJHC 53; ERCC 13.2018 (7 February 2020)

tribunal. He did so because his claim exceeded the tribunal's jurisdiction of \$40,000.00.

8. Section 188 of the Employment Relations Act permits a worker in the essential service industry to lodge an employment grievance. The right to do so was introduced by the amendment to the law in 2015, which established a separate regime in respect of essential service industries. For this purpose, part 19 of the Act was repealed and a replacement was enacted by the amendment. The terms "employment grievance", "worker" and "employer" are defined in section 185 of the Act. There is no dispute that the defendant is an employer in the essential service industry.

9. Section 188 (4) of the Act states:

*"Any employment grievance between a worker and an employer in essential services and industries that is not a trade dispute shall be dealt with in accordance with Parts 13 and 20, provided however that any such employment grievance must be lodged or filed within 21 days from the date when the employment grievance first arose, and —*

*a. where such 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 and 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 that worker under this Act".*

10. The amended statute allows a worker to file an employment grievance within the period specified by section 188 (4) of the Act. The statute does not provide for an extension of time. On the face of it, the stipulated period seems mandatory. The objective of the time limitation appears to be the expeditious resolution of employment grievances within an essential service industry. The plaintiff took more than a year to file action in this court. The time taken by the plaintiff to lodge his grievance far exceeds what has been statutorily prescribed. Even if the words in the section are to be taken as merely directory, the delay in filing the grievance in this court is far from reasonable.

11. The defendant's application was made in terms of Order 18 rule (1) (d). Rule 1 states:

"The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement of any writ in the action, or anything in any pleading or in the endorsement, on the ground that –

- (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 the fair trial of the action;
- Or
- (d) it is otherwise an abuse of the process of the Court;

And may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be".

12. Courts have consistently held that it is only in plain and obvious cases that recourse should be had to the summary process of striking out an action. A defendant must not be subjected to the inconvenience in defending a case that has no prospects of success.
13. The plaintiff's employment was terminated on 23 November 2017. This action was filed on 28 February 2019. I am unable to agree that the plaintiff is entitled to maintain this proceeding after having filed action so long after his employment grievance first arose. Agreeing with the plaintiff's contention would render the statutory period meaningless. Allowing this proceeding to continue will result in the abuse of the process of this court. The defendant succeeds in its strike out application.
14. A further matter that needs to be mentioned concerns the jurisdiction of this court. This was not raised by the parties. Section 188 (4) of the Act does not specify the forum in which an employment grievance is to be lodged. Section 211 (1) (a) confers the Employment Relations Tribunal with jurisdiction to adjudicate on employment grievances. No such jurisdiction is expressly conferred on the Employment Relations Court. Section 110 (3) of the Act requires all employment grievances to be first referred for mediation services. Section 194 (5) of the Act

states that if a mediator fails to resolve an employment grievance or an employment dispute, the mediator shall refer the grievance or dispute to the Employment Tribunal. The statute sets out salutary mechanisms for the resolution of employment grievances. Parliament has mandated mediation procedures and vested the tribunal with features that are meant to assist in the effective resolution of or adjudication of grievances. Mediation services, the tribunal and the court have been established to carry out their different powers, functions and duties. The tribunal has power to adjudicate on matters within its jurisdiction relating to claims up to \$40,000.00. The legislature has not raised this limit. Revising the limit is a matter for the legislature. Section 218 of the Act provides for the transfer of proceedings from the tribunal to the court in specified circumstances. Subject to those circumstances, the statutory scheme of the Employment Relations Act suggests that an employment grievance must be adjudicated in the tribunal in the first instance. A court cannot arrogate jurisdiction to itself unless the power to adjudicate is conferred expressly or by clear implication. I am of the view, therefore, that the plaintiff could not have invoked the jurisdiction of this court by filing an employment grievance for adjudication, which must be dealt with in the first instance by the tribunal.

### ORDER

- A. The plaintiff's action is struck out.
- B. The parties will bear their own costs.

Delivered at **Suva** on this **01<sup>st</sup>** day of **May, 2023**.



M. Javed Mansoor  
Judge