

IN THE EMPLOYMENT RELATIONS COURT
AT SUVA

ERCC No. 05 of 2019

BETWEEN : TIMAIMA VULIMAILAUCALA

APPLICANT

AND : MINISTRY FOR EDUCATION, HERITAGE AND ARTS

RESPONDENT

BEFORE : M. Javed Mansoor, J

COUNSEL : Mr. D. Nair for the plaintiff

: Ms. R. Pranjivan for the defendant

Date of Hearing : 25 November 2019

Date of Decision : 6 March 2023

DECISION

EMPLOYMENT LAW *Notice of motion seeking declaratory relief and reinstatement – Essential service and industry – Jurisdiction of the Employment Relations Court – Section 188 (4), Employment Relations Act as amended by Act No.4 of 2015*

1. The plaintiff filed a notice of motion seeking *inter alia* the following:
 - 1) “A declaration that the decision of the respondent to impose the disciplinary action of dismissal effective from 25 February, 2019 is procedurally unfair, lacked impartiality and independence, and in breach of the principles of natural justice.
 - 2) A declaration that the decision of the respondent to dismiss the applicant from her employment is unlawful, unfair and unjustified.
 - 3) An order for the plaintiff be reinstated to her employment without any loss of benefits and entitlements”.
2. The applicant stated in her affidavit in support that she joined the Ministry for Education, Heritage and Arts on 11 December 2017 as manager, employee administration on a 3 year contract. She reported to the deputy secretary, human resources and the human resources advisor. On 4 October 2018, the respondent endorsed the applicant’s probation performance report and approved her confirmation. Her salary was also reviewed. However, on 7 December 2018, the applicant was issued a show cause letter asking her to explain non-performance and why she did not follow procedures prescribed to her role. The applicant responded on 20 December 2018. On 25 February 2019 she was issued with a dismissal letter.
3. The applicant stated that the reasons given for her dismissal were the same as the issues raised in her show cause letter to which she had responded. She said that she was not given an opportunity to defend herself against those allegations, and that the summary dismissal of her employment without the finding of gross misconduct was arbitrary and done in bad faith. She said that the show cause letter ought to have been issued after introducing a performance improvement

plan as stipulated under the discipline guideline, and that such a plan was not introduced by the respondent. The applicant sought reinstatement without the loss of entitlements and benefits under her contract of employment.

4. Ms. Alison Burchell, the permanent secretary for the Ministry of Education, Heritage and Arts gave an affidavit in opposition on behalf of the respondent. The affidavit confirmed that the applicant signed her contract of service as manager on 29 November 2017 for a duration of 3 years with effect from 11 December 2017. She said the applicant's performance was assessed by the Ministry and she was asked to show cause in regard to the matters stated in the show cause letter. The permanent secretary confirmed terminating the applicant's contract of employment after receiving the applicant's response to the show cause letter.
5. In her affidavit, Ms. Burchell gave several instances of the applicant's nonperformance in her role as manager, employee administration. She stated that the applicant was provided with information of the required standard by emails dated 12 December 2018, 25 January 2019 to 31 January 2019, 28 January to 30 January 2019, 6 February 2019 to 11 February 2019 and 15 February 2019. By email, she said, the applicant was provided a confirmation of the reasons for her underperformance by emails dated 13 and 14 February 2019. The applicant was also informed of what was required of her to improve performance by emails dated 15 November & 5 December 2018, and 13 February & 26 February 2019. She said that the discussions between the applicant and her was documented with an agreed plan for improvement, and the applicant's performance was monitored and feedback provided to her.
6. Ms. Burchell agreed that she endorsed the applicant's probation performance report for the period 11 December 2017 to 11 June 2018. She pointed out that the show cause letter did not relate to the probation period and said that it concerned subsequent underperformance. Ms. Burchell stated that after receipt of the applicant's response to the show cause letter, she decided to continue the performance improvement plan to allow the applicant to show improvement in her performance. She says that the applicant's contract was terminated due to

poor performance and inappropriate conduct, and that she took all measures to continue to work on improving the applicant's performance. Ms. Burchell said the applicant's performance did not improve, and that the termination of her employment was fair, justifiable and lawful.

7. Both parties were represented at the hearing. The applicant submitted that the employment grievance was filed within 21 days as required by law. She submitted that the action should not be struck out due to a defect or for want of form. Reference was made to section 235 of the Employment Relations Act, which says that the court or tribunal could at any stage of the proceeding, on its motion or on application, amend or waive an error or defect in the proceedings in order to dispose of a matter effectively. The applicant submitted that in terms of section 220 (1) (h) of the Act, the Employment Relations Court has jurisdiction to hear and determine an action founded on an employment contract. Reference was also made to section 220 (4) which decrees that no decision or order of the court, and no proceedings before the court, may be held to be invalid for want of form, or be void or in any way vitiated by reason of an informality or error in form. The applicant submitted that in terms of the Act, he had the right to refer an employment grievance to the Employment Relations Court without referring it to mediation.
8. In reply, the respondent submitted that the court has no jurisdiction to hear the applicant's application as she had not complied with the requirements of section 188 (4) of the Act. The respondent submitted that the provision was applicable as the Ministry for Education, Heritage and Arts is an essential service and industry.
9. Section 188 (4) of the Employment Relations 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 respondent submitted that section 188 (4) of the Act requires mandatory compliance with grievance procedures under parts 13 and 20 of the Act, which includes reference of the grievance to mediation services. The respondent referred to excerpts of speeches in Parliament during the passage of the bill to amend the Act in 2015, and submitted that the intention of the legislature was to refer employment grievances arising from the essential services and industries to the Employment Relations Tribunal. The submissions also made reference to section 110 (3) of the Act, which states that all employment grievances must be first referred to mediation services set out in division 1 of part 20 of the Act. It was submitted that the court did not have jurisdiction to hear the case, as the applicant did not exhaust grievance procedures specified in part 13 of the Act.
11. In addition to the definition given in section 4 of the Employment Relations Act, section 185 of the Act defines the term “employment grievance” for the purpose of part 19 of the Act. The definition includes dismissal or termination of any worker. The definition of “essential service industry” includes the government. The applicant did not deny that the respondent is an employer in the essential service and industry.
12. I agree with the respondent that the applicant’s employment grievance should be adjudicated by the Employment Relations Tribunal unless there is reason to transfer the grievance to the Employment Relations Court in accordance with the Act. Section 211 (1) (a) of the Employment Relations Act specifically confers jurisdiction on the Employment Relations Tribunal to adjudicate on employment grievances. Section 194 (5) requires a mediator to refer an employment grievance to the Employment Relations Tribunal, if the mediator fails to resolve the

grievance. It can be said that section 188 (4) read with section 211 of the Act confers the Employment Relations Tribunal with the jurisdiction to hear an employment grievance of a workman in the essential services and industries.

13. The applicant submitted that the court has jurisdiction to hear and determine an action founded on an employment contract. However, the applicant's complaint is not founded on contract. It will not suffice to say that the employer and the employee are parties to an employment contract. The applicant's complaint is that the respondent's decision to dismiss her from employment was unlawful, unfair and unjustified. The applicant has raised an employment grievance in this court. The basis of the grievance is made out in her supporting affidavit, by which she seeks reinstatement without the loss of benefits. The forum for adjudication of that grievance is the Employment Relations Tribunal.
14. Another ground of objection raised by the respondent is that the matter was not referred for mediation. This question need not be adjudicated in view of the reasoning stated above. The reliefs sought by the applicant will not be granted.

ORDER

- A. The applicant's notice of motion is struck off.
- B. The parties will bear their costs.

Delivered at **Suva** on this 6th day of **March, 2023**.

M. Javed Mansoor
Judge