IN THE EMPLOYMENT RELATIONS COURT OF FIJI AT SUVA

CENTRAL DIVISION

ERCA No. 12 OF 2021

BETWEEN: **NICHOLAS FUATA**

APPELLANT

AND: **UNIVERSITY OF THE SOUTH PACIFIC**

RESPONDENT

Date of Hearing	**:**	**5th September 2023**
For the Applicant	**:**	**Ms Vaurasi L.**
For the Respondent	**:**	**Mr Suguturaga P. and Ms Nagera M.**
Date of Decision	**:**	**28 February 2024**
Before	**:**	**Mrs Levaci, SLTTW Acting Puisne Judge**

J U D G M E N T

(*APPEAL AGAINST THE DECISION OF THE EMPLOYMENT RELATIONS TRIBUNAL*)

PART A – BACKGROUND AND GROUNDS OF APPEAL

1. This is an appeal against the Employment Relations Tribunal to dismiss the Appellants application against the Respondent for want of prosecution.

2. The decision of the learned Tribunal was as follows:

   "*I hereby ordered that this action is dismissed for want of jurisdiction. I make no order as to costs*."

3. The Respondent has filed very limited grounds of appeal on the following premise:

1. "The Tribunal erred in law and finding that the Visitor has jurisdiction in failing to consider and or disregard:

   (i) The requirements of section 168 of the Employment Relations Act that was applicable to the Grievors contract.

   (ii) The requirements under Article 21 of the Fiji Constitution that was applicable to the Grievors contract which would require the Grievor to be afforded fair employment practices in alerting any employee to the Visitor Jurisdiction in order to invoke the jurisdiction.

2. That the Tribunal erred in law in dismiss the action for want of jurisdiction."

PART B: LAW ON APPEAL

4. Section 220 (1) of the Employment Relations Act 2007 stipulates that –

   '220 (1) The Employment Relations Court has jurisdiction –

   (a) To hear and determine appeals conferred upon it under this Promulgation and any other written law.'

5. Section 242 (2) (4) and (7) of the Employment Relations Act 2007 states –

   '(2) An appeal to the court must be made in the prescribed manner within 28 days from the date of the decision of the tribunal.

   (4) Subject to subsection (2) an appeal lies as of right to the Employment Relations Court –

   (a) From any first instance decision of the tribunal; or
   (b) Where any ground of appeal from any appellate jurisdiction of the tribunal involves a question of law.

   (7) When hearing or determining an appeal the court may-

   (8) Confirm, modify, or reverse the decision or a part of the decision of the tribunal or set aside the decision of the tribunal and substitute its own decision; or
   (9) Refer the matter with or without any direction to the tribunal to reconsider, either generally or in respect of specified matters, the whole or part of the matter to which the appeal relates.''

6. An Appellate court will be slow to interfere with the factual findings of an original court unless they are plainly wrong or drew wrong inferences from the facts and the Appellate court need not exercise jurisdiction to interfere with the Tribunal's decision only because it exercised its discretion in another way (see Tuckers Employees and Staff Union -v- Goodman Fielder International (Fiji) Limited ERCA No. 28 of 2018). The Appellate Court will review a decision where-

   (i)From the face of the record the Court finds that the Tribunal has blatantly erred in facts or law and

(ii)Has acted in ultra vires or has failed to consider a pertinent issue raised before the Tribunal.

7. The Appellate Court will not overturn a decision of the Tribunal unless the above factors have been met. Consideration is made to the observations of Lord Reid in Benmax -v- Austin Motors Co Ltd [1955] ALL ER 376 at 329 :

> 'I think the whole passage, refers to cases where the credibility or reliability of one or more witnesses has been in dispute and where a decision on these matters has led the trial judge to come to his decision on the case as a whole. That be right, I see no reason to doubt anything said by Lord Thankerton. But in cases where there is no question the credibility or reliability of any witness, and in cases where the point in dispute is the proper inferences to be drawn from proved facts, an appeal court is generally in as good a position in evaluating the evidences as the trial judge, and ought not to shrink from that task, though it ought of course to give weight to his opinion….' (underlining my emphasis).

PART C: SUBMISSIONS

8. In their submissions the Appellant argued that on a preliminary objection as to whether the Employment Relations Tribunal (Learned Tribunal) had jurisdiction, the Learned Tribunal determined that the appropriate authority to deal with the complaint from the Appellant was with the Visitor of the University and the Tribunal. The Appellant was notified of restructuring of the positions of employment in USP and hence the Appellant was unable to retain his post. The Appellant was unaware of the Visitor jurisdiction which was referred to in the Contract. Pursuant to section 168 of the Employment Relations Act which establishes the Learned Tribunal, whether the Visitors appointment is still in existence.

9. In Response, the Respondent states that pursuant to the Order in Council which establishes the University of the South Pacific, the Appellant was contracted as Student Counsellor on 25 July 2019 and by virtue of the contract, was subjected to USP charters and statutes including his redundancy. The Charter and Statute also empowers the USP Council to appoint a Visitor whose function is to determine disputes between the University and member staff or the University and Students including an Ordinance to govern the terms of office and duties of the Visitor.

10. Section 3 of the Visitors Ordinance is as follows –

> "subject to the Charter and the Statutes of the University, and this Ordinance, the Visitor is to determine any dispute which is referred to the Visitor under this Ordinance, or the Ordinance for the Discipline of Academic and Comparable Staff or the Ordinance of the Discipline of Students."

PART D: LAW ON VISITORIAL JURISDICTION

11. In "The *University Visitor – Unwanted Legacy of Empire or a Model of University Governance for the Future'* written by Peregrine W.F. Whalley & Dr Gillian R. Evans [1988] Mc Arthur Law Review 6 (1988) McArthur Law Review 109 stated:

"The traditional role and function of the University Visitor has a threefold character: ceremonial, appellate and original interventionist. Of these aspects, the ceremonial role is today the least controversial, and the one with which is most usually associated. In New South Wales, therefore, the ceremonial functions associated with the office were preserved when all other functions were abolished in 1994."

12. In the book on 'Administrative Law', Wades and Forsyth (7th Edn, Clarendon Press, Oxford 1994) p 563 provides:

"The courts have in general held that academic disciplinary proceedings require the observance of the principles of natural justice but equally they have refuse to apply unduly strict standards, provided that the proceedings are substantially fair. Universities and Colleges have in many cases established detailed disciplinary procedures under their own internal rules, often with rights of appeal. But where the case calls for the application or interpretation of internal rules, and the university or college has a visitor, it will fall within the Visitors jurisdiction and the Court will not entertain it. The law as to Visitorial jurisdiction has been clarified by the House of Lords in two cases of dismissed university lecturers, holding that it extends to all questions arising out of the institutions internal rules, notwithstanding that they involve contractual relations and notwithstanding that the complainant is a member of the institution; but it is subject to judicial review for breach of natural justice as well as for lack of jurisdiction and of power.

…Jurisdiction will be in the Visitor if the case turns upon internal rules. But if it comes within the statutory law of employment protection, protecting against unfair dismissal, the statutory law is overriding. Elaborate dismissal procedures for universities and colleges have been instituted under the Education Reform Act 1988. To the extent Parliament has transferred jurisdiction of the visitor to special statutory bodies and tribunals."

13. Therefore in Reg -v- Hull University Visitor, Ex p. Page (HL) [1993] AC 683-712 at 695-696 by Lord Browne- Wilkinson:

"It is established that a university being an eleemosynary charitable foundation, the visitor of the university has exclusive jurisdiction to decide disputes arising under domestic law of the University. This is because the founder of sucha body is entitled to reserve to himself or to the visitor whom he appoints the exclusive right to adjudicate upon the domestic laws which the founder had established to the regulation of the bounty. Even where the contractual rights of an individual (such as his contract of employment with the university) are an issue. If those contractual rights are themselves dependent upon rights arising under the regulating documents of the charity, the visitor has an exclusive jurisdiction over disputes relating to such employment. These propositions are well established in Thomas –v- University of Bradford [1987] AC 795 which held that the Courts had no jurisdiction to entertain disputes which must be decided by the visitor. However Thomas case was concerned with the question whether the courts and the visitor had concurrent jurisdictions over such disputes. In that context alone it was decided that the visitor's jurisdiction was exclusive."

14. In this case, the University of the South Pacific was established by a Royal Charter on 4th of February 1970 ceasing the Interim Council under the USP Ordinances and thereby establishing the USP Council. The Royal Charter empowered the USP Council to create rules for the purposes if disciplinary, enrolment etc. Regulation 4 stipulates :

> "The University shall, subject to this Our Charter and the Statutes, have the following powers:-
> *(a)* To institute Professorships, Readerships and Lectureships and other offices of any kind and whether academic or not as the University may consider appropriate; to appoint persons to and to remove them from such offices and to prescribe their conditions of service."

15. Very clearly the Charter empowers the Council to appoint members of the university including their conditions of service and their removal.

16. Section 27 of the Royal Charter of the University of the South Pacific appoints a Visitor and establishes its exclusive jurisdiction as follows –

> "We reserve unto Ourself, Our Heirs and Successors, the right, on representation from the Council made in pursuance of a resolution passed by a simple majority of the members of the Council present and voting, to appoint by Order in Council a Visitor of the University for such period and with such duties as We, Our Heirs and Successors, shall see fit and his decision on matters within his jurisdiction shall be final."

17. In New Zealand in Norrie -v- Senate of the University of Auckland [1984] 1 NZLR 129 is a contrary view to the approach in England. It held that the Court retained the power of adjudication over matters within the Visitors jurisdiction whether or not the Visitors jurisdiction was resorted to. The jurisdiction of the Court was Supervisory and absent allegations of unfairness of questions of law, the dispute proceeded by way of Judicial Review or otherwise, if the applicant had not first resorted to his domestic remedy i.e. Visitor.

18. In the paper written by Whalley P and Dr Evans G titled "*The University Visitor- An Unwanted Legacy Empire or a Model of University Governance for the Future?*" (1998, 2 MAC LR) when discussing the Visitors jurisdiction in New Zealand stated:

> "In the short decade prior to its abolition, New Zealand visitorial practice developed a number of features which must be usefully considered and accepted in Australia, or elsewhere where jurisdictional and/r procedural ambiguities continue to arose concern. An interesting feature of the Rigg -v- University of Waikato (1984) 1 NZLR 149 case for example, was the decision to distance the vice regal office from the process for enquiry and hearing. Having accepted a petition, the Visitor delegated the enquiry and hearing to two Commissaries, one a retired judge and the other an experienced academic.
>
> In the same year, the Supreme Court of New Zealand declined to recognize the Visitors exclusive jurisdiction (see: Norrie -v- Senate of the University of Auckland [1984] 1 NZLR 129). It noted that English universities traditionally established by charters

while New Zealand Universities are established by statute. As a matter of statutory interpretation, therefore, the Supreme Court held that Parliament could not have intended to exclude universities from the jurisdiction of the Court. Of additional relevance to current Australian concerns, the court also clearly contemplated that a Visitor might consider the merits of particular decisions in appropriate circumstances, thereby confirming dicta in Riggs case. In this review of the Visitors role, Brookfield subsequently confirmed that the Visitor was concerned not only with procedural fairness but also substantive fairness.[1]"

19. The local case of Muma -v- University of the South Pacific [1995] FJCA 9ABU0052u;91s (2 May 1995 set the precedent regarding Visitorial jurisdiction in Fiji and held that :

"We have no doubt therefore that in August 1989 when the appellants writ of summons was issued even though no visitor had been appointed in pursuance of section 27 of the Charter, the University had a Visitor, namely the President of Fiji, by operation of the law and that it has done so ever since. Accordingly, we are satisfied that the learned judge was right when he ruled that the appellant could not come to Court to seek the declarations which he was seeking in his Statement of Claim. As a member of the University he could have taken to the Visitor his complaint about the matters raised in paragraphs 4 to 11 of his Statement of Claim; they were, therefore, not justiciable in a court. If the appellant had not been a member of the University, he could not have made them the subject of the claim in a court because he lacked the standing to do so. Consequently his Lordship correctly ordered that paragraphs 4 to 11 be struck out. The appeal, must, therefore be dismissed." (underlining my emphasis)

PART E: ANALYSIS

Is the Greivor subject to section 168 of the Employment Relations Act?

20. Section 168 of the Employment Relations Act 2007 stipulates as follows:

"*Procedures for settling disputes*

168.—(1) An employment contract must contain procedures for settling disputes.

(2) The procedures required by subsection (1) must be

(a) agreed procedures that are not inconsistent with the requirements of this Part; or

(b) if there are no agreed procedures, the procedures set out in Schedule 6.

(3) The agreed procedures of the types referred to in subsection (2)(a) may confer jurisdiction on the Permanent Secretary to refer the employment dispute to the Mediation Services or to the Tribunal.

[1] FM Brookfield, "The Visitor in New Zealand Universities" (1985) 11 New Zealand Universities Law Review 382 at 391.

21. Section 168 of the Employment Relations Act states that every contract of employment must contain provisions for settlement of disputes relating to the terms of employment. Sub section (2) stipulates that the agreed procedure may confer powers on the Permanent Secretary to refer the dispute to the Employment Relations Tribunal.

22. The Court finds that despite the discretionary powers given to the Permanent Secretary, where a member of the University has any grievances, there are internal processes that are required to be followed for which falls within the jurisdiction of the Visitor. These are therefore procedures for settlement of employment disputes and grievances and agreed upon by the parties in their terms of employment contract.

23. Hence pursuant to the provisions of the Royal Charter and Ordinances, the Visitor has exclusive jurisdiction to deal with grievances and disputes arising from contractual employments within the University.

24. Therefore despite the Appellants argument that he was unaware of the Visitors jurisdiction and powers, the terms of the contractual employment required him to understand all the policies and ordinances governing his employment in the University.

25. The Visitor jurisdiction is exclusive from the Courts jurisdiction as per Muma Case (Supra).

26. And hence the signing of the contract rendered the Appellant to the terms and conditions of the employment contract, its ordinances and its policies and regulations.

27. If in the event the Appellant had exhausted his remedies by seeking the Visitor grievance procedures and alleged that the procedures were not correctly adhered to, the Court retains supervisory jurisdiction by way of judicial review to consider the application.

28. In this instance the Appellant had failed to seek his reliefs by way of lodging his grievances via the internal processes within the University and thus failed to put his foot in the door to seek the Visitor to adjudicate on his dispute.

29. In implementing the Visitors jurisdiction there are tried and tested grievance procedures that need to be complied with.

30. The Court found that the learned Tribunal did not err in law and in fact in finding that the Visitors Jurisdiction for employment disputes was exclusive to members of the University including the Appellant.

31. The Court also found that that there is no ambit within which the Appellant can rely upon the Constitution regarding the Visitors jurisdiction to deal with disputes by members of the University when the Appellant himself has not been able to establish as in what manner the University has breached natural justice when the Appellant himself has not complied with the internal procedures in place for grievances and disputes stipulated by Regulations and Ordinances of the University.

32. The court finds that there is nothing to show that the Tribunal had erred in law and in facts when in fact the Appellant had failed to seek the jurisdiction of the Visitor.

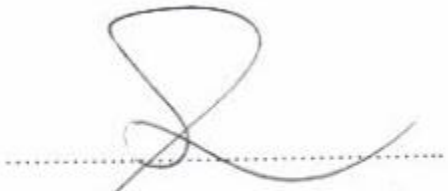
Orders of the Court:

33. **The Court orders as follows:**

(a) That the Appellants Grounds of Appeal are dismissed;

(b) That the decision of the learned Tribunal is upheld;

(c) That costs of $1000 be awarded to the Respondent.



Mrs Senileba LWTT Levaci

Acting Puisne Judge