IN THE HIGH COURT OF FIJI
(WESTERN DIVISION) AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. ERCC 2 of 2021

BETWEEN : **DINESH CHAND** of Tavakubu, Lautoka Unemployed
PLAINTIFF

AND : **GOODMAN FIELDER INTERNATIONAL (FIJI) LIMITED** a limited liability company having its registered office at 3 Karsanji Street, Suva.
DEFENDANT

BEFORE : Justice Mr. A.M. Mohamed Mackie.

APPEARANCES : Mr. Nair. D- For the Plaintiff.
Mr. Low. T- for the Defendant.

DATE OF HEARING : 23rd October, 2023

SUBMISSIONS : filed on 3rd October2023 by the Plaintiff & Defendant.

DATE OF JUDGMENT : 11th March, 2024

RULING

Catchwords

Employment Law -Unlawful & Unfair Dismissal under Section 33 and 34 of ERP 2007– Relief Under Section 230 of the ERP 2007 for Reinstatement, Reimbursement, and payment of Compensation for Humiliation, Loss of Dignity & Loss of Benefits – Application for Strike Out Under Order 18 rule 18, High Court Rules 1988

1. The plaintiff, through his then Solicitors on 25th of June 2021, filed his writ of Summons and the statement of claim against the Defendant seeking the following reliefs;

   a) The sum of $ 76,327.23 for loss of wages;
   b) The sum of $11,960.57 for loss of FNFP contribution;
   c) Reinstatement of employment to his former position with full benefits;
   d) Interest;
   e) Post judgment interest;
   f) Such other reliefs as this Honorable Court deems fit.

2. In order to justify the above reliefs, the plaintiff in his statement of claim has moved for findings under Section 33, 34 and 230 of the Employment Relation Act 2007(ERA).

3. The statement of claim the Plaintiff has stated, *inter alia*;

I. ***THAT** he had been employed by the Defendant since 2006 and was terminated from his employment on 18th September 2015.*

II. ***THAT** he was threatened, bullied, intimidated and coerced by the Defendant to participate in an internal investigation and hearing, and he was not given opportunities to seek independent legal advice or assistance to represent him during the investigation and hearings.*

III. ***THAT** he was not made aware of the progresses of internal investigations and hearings within the Defendant Company and he was never given a fair hearing.*

IV. ***THAT** the wrongful allegation of theft was never proven or based on proper or reliable evidence but more on hearsay evidence.*

V. ***THAT** there was no credible evidence or proof that he had ever been involved in any form of theft or misconduct during his almost nine years of employment with the Defendant prior to his unlawful and unfair termination.*

VI. ***THAT** he was never given a warning letter and was unfairly and unlawfully dismissed by the Defendant from the position of delivery driver on the ground of theft, and a complaint in this regard was lodged at the Fiji Police.*

VII. ***THAT** a Criminal action No- 635 of 2015 was filed against him at the Magistrate's Court of Lautoka and on 13th August 2020 he was acquitted of all charges.*

VIII. ***THAT** after the acquittal, he was approached by the Defendant company and asked to rejoin the Company, but when he contacted the Human Resources Department his reinstatement was refused.*

IX. *THAT due to the Defendant's action, he had no formal employment for 5 years, he had to do odd jobs and has suffered damages.*

4. Accordingly, the Plaintiff claimed reliefs, inter alia, a sum of $76,327.23 as loss of wages, a sum of $ 11,960.57 for loss of FNF contribution, and other reliefs as stated above.

5. The Defendant by its Statement of Defence filed on 16th August 2021, having admitted the contents of paragraphs 1 and 2 (Re- the employment and dismissal of the Plaintiff) and about the lodging a complaint with the Fiji Police against the Plaintiff , denied the contents of the rest of the averments in the SOC, and specifically stated that the Plaintiff was terminated for failing to comply with the Defendant's legitimate instructions, practices, policies and procedures when carrying on his duties.

6. After filing of respective Affidavits Verifying List of Documents and when the matter was pending for PTC minutes, the Defendant filed the summons in hand on 28th April 2023 seeking to strike out the statement of claim under Order 18 rule 18 (1) of the High Court Rules 1988 on the grounds THAT the Plaintiff's Statement of Claim;

   a. *Discloses no reasonable cause of action;*
   b. *Is frivolous and/ or vexatious;*

c. *Is otherwise an abuse of the process of the court*
In that the Employment Relations Court has no jurisdiction to adjudicate the claims pleaded in the statement of claim.

7. At the hearing held before me on 23rd October 2023, counsel for both parties made oral submissions and additionally on behalf of the Defendant written submissions was filed along with (13) annexures of which 12 annexureswere case law authorities, dealing with the issue in hand, while the Plaintiff also filed his written submissions, along with one authority . I profusely thank both the learned counsel for the same.

<u>Defendant's Submission</u>

8. On behalf of the Defendant, it was submitted that this Court should strike out the Statement of Claim and dismiss the action for the following reasons;

a. *"Employment grievances" are statutory form of complaint that are distinct from "Actions" brought in Civil jurisdiction of the High court;*
b. *The ERC has no jurisdiction over this matter (which by its very nature is an employment grievance as defined under the ERA);*
c. *The ERC has no original jurisdiction over this claim because **Part 13 and 20 of the ERA** does not provide for employment grievances to be reported to the ERC, and*
d. *Parts 13 and 20, and the scheme of the ERA require for "employment grievances" to be referred first to Mediation Services and if not settled, to be referred to the Employment Relation tribunal (ERT)*

<u>The Plaintiff's Submission:</u>

9. On the other hand, it was submitted on behalf of the Plaintiff;

a. THAT *he is seeking determination under section 33, 34 and 230 of the ERA, and the claim in principle relates to the termination of employment, therefore the Defendant will have to prove the cause for termination that is whether statement of claim discloses a reasonable cause of action against the Defendant.*

b. THAT *the within substantive action involves the dismissal of the Plaintiff, therefore there are triable issues of facts and laws in view of which, it would be inappropriate to strike out the employment action.*

c. THAT *this Court has jurisdiction to hear the claim that is founded on the employment relationship between the parties. The procedure in filing of matters in the court under regulation 16 is provided by section 238 (1) (b) of the Act that expressly state: -*

1. *The Chief Justice may from time to time make rules for the purpose of regulating the practice and procedure of the tribunal or the Court.*
2. *In the absence of such rules, or where no provision is made for a particular circumstance*
    a. *The Magistrates' Court Rule rules apply to the proceedings before the Tribunal; and*
    b. *The High court rules apply to the proceedings before the Employment Relations Court.*

d. THAT *Section 15(2) of the Constitution gives the Plaintiff the right to have his dispute determined by this Court.*

- ***e.*** ***THAT*** *the Court derives jurisdiction from Section 220 of the Act, and sub section (h), (i) , (n) and (3) and section 220 (3) and under section 211 (2) subject to sub section (3), the tribunal has power:*
    - *(a) To adjudicate on matters within its jurisdiction up to $40,000.00; whereas the Employment court is established as a division of the High court and section 100(3) of the constitution gives this court unlimited original jurisdiction.*

THE LAW

10. The Provisions relating to striking out are contained in Order 18, rule 18 of the High Court Rules, 1988. Order 18, rule 18 of the High Court Rule reads;

> 18. – (1*) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action or anything in any pleading or in the indorsement, 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.*
>
> *(2) No evidence shall be admissible on an application under paragraph* (1) (a).

11. Footnote 18/19/3 of the 1988 Supreme Court Practice reads*;*

> *"It is only plain and obvious cases that recourse should be had to the summary process under this rule, per Lindley MR. in Hubbuck v Wilkinson (1899) 1 Q.B. 86, p91 Mayor, etc., of the City of London v Homer (1914) 111 L.T, 512, CA). See also Kemsley v Foot and Qrs (1952) 2KB. 34; (1951) 1 ALL ER, 331, CA. affirmed (195), AC. 345, H.L .The summary procedure under this rule can only be adopted when it can be clearly seen that a claim or answer is on the face of it obviously unsustainable " (Att – Gen of Duchy of Lancaster v L. & N.W. Ry Co (1892)3 Ch 274, CA). The summary remedy under this rule is only to be applied in plain and obvious cases when the action is one which cannot succeed or is in some way an abuse of the process or the case unarguable (see per Danckwerts and Salmon L.JJ in Nagle v Feliden (1966) 2. Q.B 633, pp 648, 651, applied in Drummond Jackson v British Medical Association (1970)1 WLR 688 (1970) 1 ALL ER 1094, (CA) .*

12. Footnote 18/19/4 of the 1988 Supreme Court Practice reads;

> *"On an application to strike out the statement of claim and to dismiss the action, it is not permissible to try the action on affidavits when the facts and issues are in dispute (Wenlock v Moloney) [1965] 1. WLR 1238; [1965] 2 ALL ER 87, CA).*
>
> *It has been said that the Court will not permit a plaintiff to be "driven from the judgment seat" except where the cause of action is obviously bad and almost incontestably bad (per*

Fletcher Moulton L.J. in Dyson v Att. – Gen [1910] UKLawRpKQB 203; [1911] 1 KB 410 p. 419)."

13. In the case of ***Electricity Corporation Ltd v Geotherm Energy Ltd [1992] 2 NZLR 641***, it was held;

> *"The jurisdiction to strike out a pleading for failure to disclose a cause of action is to be sparingly exercised and only in a clear case where the Court is satisfied that it has all the requisite material to reach a definite and certain conclusion; the Plaintiff's case must be so clearly untenable that it could not possibly success and the Court would approach the application, assuming that all the allegations in the statement of claim were factually correct"*

14. In the case of **National MBF Finance (Fiji) Ltd v Buli [2000] FJCA 28; ABU0057U.98S (6 JULY 2000),** it was held;

> *"The law with regard to striking out pleadings is not in dispute. Apart from truly exceptional cases the approach to such applications is to assume that the factual basis on which the allegations contained in the pleadings are raised will be proved. If a legal issue can be raised on the facts as pleaded then the courts will not strike out a pleading and will certainly not do so on a contention that the facts cannot be proved unless the situation is so strong that judicial notice can be taken of the falsity of a factual contention. It follows that an application of this kind must be determined on the pleadings as they appear before the Court".*

15. In **Tawake v Barton Ltd [2010] FJHC 14; HBC 231 of 2008** (28 January 2010), Master Tuilevuka (as he was then) summarised the law in this area as follows;

> *"The jurisdiction to strike out proceedings under Order 18 Rule 18 is guardedly exercised in exceptional cases only where, on the pleaded facts, the plaintiff could not succeed as a matter of law. It is not exercised where legal questions of importance are raised and where the cause of action must be so clearly untenable that they cannot possibly succeed (see Attorney General –v- Shiu Prasad Halka 18 FLR 210 at 215, as per Justice Gould VP; see also New Zealand Court of Appeal decision in Attorney –v- Prince Gardner [1998] 1 NZLR 262 at 267."*

16. In **Paulo Malo Radrodro v Sione Hatu Tiakia & others, HBS 204 of 2005**, the Court stated that:

> *"The principles applicable to Applications of this type have been considered by the Court on many occasions. Those principles include:*
>
> *a. A reasonable cause of action means a cause of action with some chance of success when only the allegations and pleadings are considered – Lord Pearson in Drummond Jackson v British Medical Association [1970] WLR 688.*
> *b. Frivolous and vexatious is said to mean cases which are obviously frivolous or vexatious or obviously unsustainable – Lindley Li in Attorney General of Duchy of Lancaster v L.N.W Ry[1892] UKLawRpCh 134; [1892] 3 Ch 274 at 277.*
> *c. It is only in plain and obvious cases that recourse would be had to the summary process under this rule – Lindley MR in Hubbuck v Wilkinson [1898] UKLawRpKQB 176; [1899] Q.B 86.*

d. *The purpose of the Courts jurisdiction to strike out pleading is twofold. Firstly is to protect its own processes and scarce resources from being abused by hopeless cases. Second and equally importantly, it is to ensure that it is a matter of justice; defendants are permitted to defend the claim fairly and not subjected to the expense inconvenience in defending an unclear or hopeless case.*
e. "*The first object of pleadings is to define and clarify with position the issues and questions which are in dispute between the parties and for determination by the Court. Fair and proper notice of the case an opponent is required to meet must be properly stated in the pleadings so that the opposing parties can bring evidence on the issues disclosed – ESSO Petroleum Company Limited v Southport Corporation [1956] A.C at 238" – James M Ah Koy v Native Land Trust Board & Others – Civil Action No. HBC 0546 of 2004.*
f. *A dismissal of proceedings "often be required by the very essence of justice to be done" .... – Lord Blackburn in Metropolitan – Pooley [1885] 10 OPP Case 210 at 221- so as to prevent parties being harassed and put to expense by frivolous, vexatious or hopeless allegation – Lorton LJ in Riches v Director of Public Prosecutions (1973) 1 WLR 1019 at 1027"*

ANALYSIS:

17. On behalf of the plaintiff, in paragraph 1.17 of his written submissions, it has been reiterated that the Court derives its jurisdiction from section 220 (1) (h), (i), (n and [3] which states as follows.

(h) to hear and determine an action founded on an employment contract;

(i) Subject to sub section (2) and in proceedings founded on an employment contract to make any order that the Tribunal may make under any written law or the law relating to contracts.

(n) to exercise other functions and powers as are conferred on it by this or any other written law.

18. As per the Statement of Claim, nothing has been pleaded about any contract of employment. This action is not based on such a contract. Although, the Plaintiff complains that he was unfairly and unlawfully dismissed and was not granted an opportunity of being heard and represented at the internal investigations and hearings, I find his claim does not raise any matter under those provisions for him to have resorted to this court. As the counsel for the Defendant correctly alluded to, it is clear that the claim made by the plaintiff and the remedies sought can only be brought by way of an employment grievance at the appropriate forum.

19. The Plaintiff who seeks redress for his alleged employment grievances, may be owing to his negligence and/or wrong advice given to him at the initial stage, did not resort to the process of Mediation and thereafter to the employment Tribunal for the resolution of his grievances , in case if the Mediation had failed.

20. It is submitted on behalf of the plaintiff; *that, although, the Defendant is seeking to strike out the action on the alleged grounds, the court has powers under section 220 (3) and (4) of*

the Act to hear the case. That the Section 220 (3) says the court has full and exclusive jurisdiction to determine them in a manner and to make decisions or orders not inconsistent with the Promulgation or any other written law or with the employment contract. That the Section 220 (4) says 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.

21. Reference was made to the interlocutory decision of 27 August 2021 in **Salim Buksh v Bred Bank (Fiji) Ltd** [1]. In that decision, the court commented on its original jurisdiction to hear an employment grievance.

22. The particulars of the plaintiff's claim are set out in this way:

    a. That *after around 9 years of service, on 18th September 2015 he was terminated from the employment. He was threatened, bullied, intimidated and coerced by the defendant to participate in an internal investigation and hearing.*

    b. That *he was not given opportunities to seek independent legal advice or assistance from a person or persons to represent him during the internal investigation. He was not made aware of the processes was never proven or based on proper or reliable evidence, but more on hearsay. He was never given a warning letter.*

    c. That *he was not given a fair hearing during the hearing conducted by the Defendant. That finally he was unfairly and unlawfully dismissed from the position of a delivery driver by the Defendant. He was terminated on the ground of Theft and a complaint was filed with the Fiji police.*

    d. That *there was no credible evidence or proof that he had ever been involved in any form of Theft or misconduct during his almost 9 years of service at the Defendant Company. That he was finally acquitted by the Magistrates' court of Lautoka.*

23. The pivotal question that demands a plausible answer is, why the Plaintiff soon after his alleged dismissal/ termination did not raise this matter as an employment grievance before the appropriate forum, which is Mediation. 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 the Mediator fails to resolve an employment grievance or dispute, the Mediator shall refer the grievance or dispute to the Employment Relations Tribunal. Section 211 (1) (a) confers the tribunal with the jurisdiction to adjudicate on employment grievances. The legislature in its wisdom has mandated the Mediation procedures and vested the tribunal with jurisdiction, if the Mediation fails to deliver an effective and quick resolution or adjudication of grievances.

24. The Mediation services, the tribunal and the court have been established to exercise their different powers and carry out their respective functions and duties. The statutory scheme is such that an employment grievance must be referred for Mediation first and then to the Tribunal for adjudication in the tribunal, if the Mediation fails. When a worker files an employment grievance directly in court, the mandatory Mediation process prescribed by Parliament is avoided. This could not have been the intention of the statutory scheme. The Plaintiff could not have bypassed or avoided the relevant steps in the above hierarchy.

25. The Employment Relations Court's original jurisdiction is set out in sections 220 (1) (h), (k), (l) and (m) of the Act. The Act does not confer on this court the original jurisdiction to hear an employment grievance, except in the way allowed by law. Proceedings can be transferred from the tribunal to the court under section 218. Section 221 allows the court to order compliance. Under section 230 (1) of the Act, the court can grant remedies where an employment grievance is brought before it by way of transfer or in appeal. There is nothing in the statute to say that the tribunal's monetary limitation alone will confer jurisdiction on the court to hear an employment grievance.

Delay

26. Another point that deserves mention here is the delay and inaction on the part of the Plaintiff to seek redress for his alleged grievance in the manner expected of him as per the ERA of 2007. However, any excuse for the delay is not going to pardon him.

27. Subsequent to his alleged termination, he did nothing to take his grievance to the Mediation, on failure of which he could have gone before the tribunal to have the matter adjudicated. Had there been a contract as alluded to above , it would, probably, have provided an internal mechanism for the resolution of the dispute internally or provided him the avenue to come before the ERC directly seeking for relief.

28. The Plaintiff did not lodge his employment grievance by commencing it at the Mediation process within the stipulated time period from the date of his alleged termination, which occurred on 18th September 2015. All what he did was filing of his writ of Summons and the Statement of claim before this Court on 21st June 2021, which was after a long delay of 05 years 09 months and 7 days.

29. The requirement to comply with timelines for employment grievances goes to the root of the action. Had he resorted to the immediate remedies that were available under the ERA, which were mediation and proceedings before the Tribunal, if need arose, it would have paved the way to have the matter adjudicated effectively and in a timely manner.

30. In this instance, the grievance was lodged at the wrong forum after an inordinate delay of 5 years, 9 months and 7 days. At the initial stages, the Plaintiff on his own volition and/ or being wrongly advised, seems to have waited to file this action till the termination of the Magistrates' Court proceedings, by which he was exonerated.

31. The Court finds that for all intents and purposes, the grievance was lodged out of time or outside of the statutory timelines and at a wrong forum.

32. The law does not empower this Court to enlarge time and/or to refer the matter to the Mediation or to the Tribunal. Therefore, not only the failure to lodge within time, but also filing before the wrong forum left the grievance of the Plaintiff to go unaddressed.

33. The initial failure of the Plaintiff or that of his then Counsel to properly advise the Plaintiff, to refer his grievance to the Mediation as required by the Act, will not in any way now

regularize the current action. It is not an excuse to be ignorant of the law and its application. The Plaintiff should have taken proper and timely advice before he proceeded to file this belated action before this Court, which unfortunately, will not take him to his desired destination.

34. The Plaintiff's failure to lodge his grievance within the requisite timeline and filing it in a wrong forum is an abuse of process and therefore falls squarely within the grounds of Order 18 r 18 (1) (d) of the High Court Rules.

The Court finds that because the Application was not lodged within the mandatory timelines, the matter now falls outside of the ambit of the provisions of section 188 (4) of the Employment Relations Act 2007 and therefore is indeed an abuse of courts processes. On top of it, the plaintiff's claim discloses no reasonable casue of action for him to have come before this court.

35. An important jurisdictional issue, that was pending unresolved on account of conflicting decisions of the Employment Relations Court (ERC), has now been settled by the recent decision of the Court of Appeal in **ANZ Banking Group Pte Limited v Ajendra Sharma Civil Appeal No- ABU 030 of 2022** in relation to Lautoka Civil Action **- ERCA 002 of 2017** of which this Court has taken judicial notice.

36. Accordingly, for the reasons stated above, this court decides that it does not have original jurisdiction to hear and determine the plaintiff's claims.

ORDERS

a. The Defendant's Summons dated and filed on 28th April 2023 to Strike out Succeeds.
b. The plaintiff's Statement of claim is struck out.
c. The Plaintiff's action is hereby dismissed.
d. Considering the circumstances, no costs ordered and the parties shall bear their own costs.

A.M. Mohamed Mackie
Judge

At High Court Lautoka this 11th day of March, 2024.

SOLICITORS:
For the Plaintiff: **Nilesh Sharma Lawyers, Barristers & Solicitors**
For the Defendant: **Munro Leys, Solicitors**