IN THE COURT OF APPEAL, FIJI
[On Appeal from the Employment Relations Court]

CIVIL APPEAL NO. ABU 045 OF 2022
[Lautoka Case Number ERCC 04 of 2019]

BETWEEN : **ELIKI KAUMAITOTOYA**

Appellant

AND : **AIR TERMINAL SERVICES (FIJI) LIMITED**

Respondent

Coram : **Prematilaka, RJA**
Qetaki, JA
Morgan, JA

Counsel : **Mr. S. Leweniqila and Mr. T. Cabemaiwai for the Appellant**
Ms. M. Rakai for the Respondent

Date of Hearing : **08 May 2024**
Date of Judgment : **30 May 2024**

JUDGMENT

Prematilaka, RJA

[1] I have read the draft judgment of Morgan, JA and agree with reasons and proposed orders thereon.

Qetaki, JA

[2] I have had the opportunity to consider the judgment in draft. I agree entirely with Honourable Morgan, JA in the decision arrived at, reasoning and the outcome.

Morgan, JA

Introduction

[3] This is an appeal against a Decision of M. Javed Mansoor, J in the Employment Relations Court ("ERC") at Lautoka but delivered, according to the record, at Suva on the 30th June 2022 ("the decision") wherein the Judge granted an application by the Respondent that the Appellant's Statement of Claim in the matter be struck out ("the strike out application").

[4] The essence of the decision were findings that the Plaintiff's claim was statute barred and an abuse of the process of Court.

Background

[5] The background to the matter is set out in paragraphs 1 to 6 of the decision as follows:

> *"1. The plaintiff filed this action claiming damages from the defendant for unfair dismissal, wrongful dismissal and unfair treatment and humiliation. He sought damages in a sum of $25,584.50 for unfair dismissal, $319,579.68 as damages for wrongful dismissal and general damages in a sum of $50,000.00 for unfair treatment and humiliation, and aggravated and/or exemplary damages and special damages for the defendant's alleged acts of victimization and humiliation. He claimed a sum of $25,500.00 for the alleged loss of FNPF benefits.*
>
> *2. The defendant filed a summons to strike out on 3 October 2019 stating that the plaintiff's claim is statute barred, and that the action is scandalous, frivolous or vexatious or that it was an abuse of the process of court. The application to strike out was made under Order 18 rule 18 (1) (b) and (d) of the High Court Rules 1988 and the inherent power of court. The defendant moved that the statement of defence be stayed until 7 days after the hearing and determination of the application to strike out the action. On behalf of the defendant, its Manager Human Resources, Mr. Richard Donaldson, gave an affidavit in support of the defendant's summons to strike out the action.*

3. *Mr. Donaldson averred that the plaintiff's employment was terminated in January 2010 and that his claims were time barred as the plaintiff's grievance concerning his dismissal was referred to the Employment Relations Tribunal (tribunal) more than 9 years before the filing of this action on 10 July 2019. He averred that the plaintiff had failed to turn up for the hearing before the tribunal on 19 March 2014 and that, upon the proceedings being struck off on 13 May 2016, costs were ordered by the tribunal. The plaintiff had failed to comply with the costs orders made by the tribunal on 13 May 2016. Mr. Donaldson also averred that the plaintiff's case was struck out by the tribunal on 13 November 2017 for want of prosecution.*

4. *Two sealed orders were annexed to Mr. Donaldson's affidavit. The court considers the contents of these orders to be material. The order sealed by the tribunal on 18 May 2016 refers to orders made on 13 May 2016. The plaintiff and two others were named respondents in the order. The order says that the entire proceedings in employment grievances Nos. 121, 122 and 123 of 2010 are struck out for non-appearance on 13 May 2016 by the respondents and their counsel, for non-appearance by the respondents on 19 March 2014 for their interlocutory hearing, and for non-prosecution of their grievances since 19 March 2014 to 6 January 2016. The tribunal ordered those respondents to pay wasted costs of $1,000.00. Costs were awarded as the respondents in that case and their counsel were given time on more than two occasions since 15 January 2016 to file their affidavit in opposition, and as the respondents and their counsel were aware of the hearing date and were given a further opportunity to file a response to the striking out application and the order for costs for 19 March 2014 was adjourned for the appearance of the three respondents. The tribunal stated that the respondents had no right to reinstatement unless costs are paid within 30 days of the order made on 13 May 2016.*

5. *A second order sealed by the tribunal on 29 November 2017 refers to orders issued on 13 November 2017. The tribunal ordered the three matters be discontinued. There was no order as to costs. How this second order came about is not explained by either party. Both orders refer to case numbers 121, 122 & 123 of 2010.*

6. *On 17 March 2020 and 1 July 2020, Mr. Tunidau sought time to file an affidavit in opposition on behalf of the plaintiff. However, on 11*

November 2020, Mr. Tunidau informed court that the plaintiff did not intend to file an affidavit in opposition, saying that he would rely on his submissions. At the hearing, after clarifying certain matters to court, counsel for both parties said they would rely on their written submissions."

The High Court Decision

[6] In considering the application to strike out before him the Judge observed at the outset that *"…to secure the relief that has been sought the party seeking it must show cause that it is clear on the face of the opponents documents, that the opponent lacks a reasonable cause of action or it is advancing a claim that is clearly vexatious."*

[7] He then noted in paragraph 8 of his decision that the Plaintiff's claim provided a helpful summary of the case before the tribunal. Paragraph 3 of the Appellant's Statement of Claim records the procedural history of the mater as follows:-

Date	**Event**
26.04.10 & 25.05.10	Parties attended Mediation Services at the Ministry of Labour & Indusrial Relations in Nadi.
27.05.10	Matter referred to Employment Relation Tribunal.
2010-2012	Matter was called back and forth for Mentions before the Tribunal.
9.04.13	Grievor filed an application seeking to transfer matter to Employment Court.
19.03.14	Hearing on the Grievors application for transfer of proceedings. No appearance by Grievor and Counsels. Notice of Motion was struck out.
19.03.14 - 06.01.16	Grievor did not prosecute the matter.
13.5.16	Interlocutory Hearing on the Employers application. Grievor did not appear. Matter was struck out and dismissed due to non-appearance.
22.06.16	Hearing on the Grievors application to set aside the Court Order made on the 13th May, 2016.
24.09.17	Matter called for further Mention.
13.11.17	Matter was discontinued by the Grievor with no order as to costs.

[8] He concluded on the basis of this summary that the Plaintiff was very lax in prosecuting his case before the tribunal.

[9] He accepted that the Plaintiff had made an application to the tribunal to transfer his case to the ERC but that this was not followed through.

[10] He also noted that the Plaintiff did not file an affidavit to explain his position before the tribunal although he was given two opportunities to do so.

[11] He further noted that the Plaintiff's claim was premised on unfair and wrongful dismissal. With respect to the claim for unfair dismissal he considered that Section 211 (a) and (d) of the Employment Relations Act 2007 ("the ERA" or "the Act") gave the tribunal jurisdiction to adjudicate employment grievances and to determine actions for recovery of wages and other money. This being the case he considered that the Plaintiff chose the proper forum i.e. the tribunal at the outset to make his claim but that his case was dismissed with costs for non prosecution.

[12] With respect to the claim for wrongful dismissal he noted that the Plaintiff had claimed damages for breach of contract without specifying which terms of the contract had been breached.

[13] He also recorded that counsel for the Plaintiff had submitted before him that the ERA does not impose strict procedural requirements as in civil cases and that the ERA permitted flexibility in regard to employment cases and that an aggrieved party did not have to file an employment grievance within a stipulated time. He noted that Counsel for the Plaintiff agreed to tender authorities in support of his argument that the delayed filing of an action in court was permitted under flexible provisions of the ERA but he did not do so.

[14] With respect to the Defendant's contention that the claim was statute barred under Section 4 of the Limitation Act as it was not filed within six years of the termination of employment he noted that the Plaintiff had submitted that the claim was not statute barred as the proceedings had been instituted within time in the tribunal.

[15] He noted however that the proceedings before the tribunal had been discontinued. He concluded that the action was statute barred as it was not instituted within six years of the purported breach of the employment contract.

[16] He recognized that striking out was an extreme measure as it denied a litigant access to Court.

[17] He referred to the decision in **Lindon v The Commonwealth of Australia (No 2) 136 ALR 251** which I refer to later in this judgment and concluded that the material placed before him satisfied him that the proceedings were vexatious and an abuse of process of Court and made the following orders:

> A. The defendant's summons to strike out filed on 3 October 2019 is granted.
>
> B. The plaintiff is directed to pay the defendant costs in a sum of $1,000.00 within 28 days of this decision.

Grounds of Appeal

[18] The Appellant has appealed against this decision and above orders on the following grounds:-

> [1] The High Court erred in law and in fact by striking out the Plaintiff's lawsuit pursuant to section 4(1)(a) of the Limitation Act 1971 when the Defendant was required by Order 18 Rule 7 of the High Court Rules 1988 to plead any statute of limitation.
>
> [2] The High Court erred in fact and in law in its Decision by considering irrelevant matters from the Tribunal proceedings when it should have limited itself to the conduct of the Plaintiff's lawsuit in the High Court only.
>
> [3] The High Court erred in fact and in law by failing to consider that the Appellant was purportedly terminated from his contract with the Respondent in January 2010 and had commenced his grievance pursuant to section 110(3) of the *Employment Relations Act 2007* (as

amended) which required parties to attend mediation (as described in Division 1 Part 20 of the *Employment Relations Act 2007)* (as amended) on 26 April 2010 and therefore section 4(1)(a) of the *Limitation Act 1971* (as amended) did not apply.

[4] The High Court erred in fact and in law by failing to consider (at paragraph 16 of the Decision) that the *Employment Relations Act 2007* has special provisions for the filing of employment grievances and that Order 18 of the High Court Rules 1988 (as amended) and section 4 of the *Limitation Act* (as amended) will only apply if there are no such provisions in the ERA 2007.

[19] The grounds of appeal are vague and repetitive. I have had difficulty following some of the submissions filed in support of the grounds of appeal. To assist the Court Grounds of Appeal should state clearly and succinctly how it is contended the Judge has erred. I have not found this to be the case in this appeal. I will now consider each ground in the order in which they have been presented.

Ground 1

Submissions

[20] The Appellant relied on Order 18 Rule 7(1) of the High Court Rules which states:

> *"(1) A party must in any pleading subsequent to a statement of claim plead specifically any matter, for example, performance, release, any relevant statute of limitation, fraud or any fact showing illegality-*
>
> *a) which he alleges makes any claim or defence of the opposite party not maintainable; or*
>
> *b) which, if not specifically pleaded, might take the opposite party by surprise; or*
>
> *c) Which raises issues of fact not arising out of the preceding pleading."*

[21] The Appellant submitted that the Respondent "having been aware of the referral from the mediation court" filed an Acknowledgment of Service intending to contest the Appellant's claim but "failed" to file its Statement of Defence and therefore the Judge

"failed" to direct the Respondent to plead the Statute of Limitation in the Striking Out application in the Statement of Defence as required by Order 18 Rule 7 and file and serve the Defence to the Appellant. It is difficult to decipher these submissions but I understand that by this ground the Appellant is submitting that the Judge erred in law in entertaining the Respondent's strike out application without the prior filing of a Statement of Defence, specifically pleading the Statute of Limitation.

[22] The Respondent on the other hand referred to the case of **Renee Wurzel v Minika Tappen Management Ltd (2001) 1 FLR 275** where the High Court observed that failure to expressly plead a defence of limitation is a curable error, a matter of procedure only.

[23] Further, the Respondent submitted that Order 18(1) allows the Court at any stage of the proceedings to strike out a matter on the grounds that it is scandalous frivolous or vexatious or that it is otherwise an abuse of the process of the Court. The Respondent relied on the authority of **Attorney General of Duchy of Lancaster v L & N.W. Ry (1892) 3 Ch 274** where it submitted it was held:

> *"where a Defendant challenges a statement of claim under Order 18 it is quite proper that the application be made before serving a defence. The whole thrust of O. 18(1)(a) is to relieve a party from having to plead to a statement of claim which discloses no reasonable cause of action. A party should not be forced to plead prior to a determination being made as to whether in fact it should so plead, see Smith v Croft No.2 (1988) 8 Ch 114". Where the plaintiff's statement of claim neither pleads, nor stablishes a cause of action against D1 & D2 for liability as the result of any excessive actions of D3 during the course of the eviction, an omission by the defendants to obtain writ of possession to enforce order of possession was an irregularity giving rise to the plaintiff's remedy being under the rules of the HC, not by way of a tortious duty of care, but the plaintiff did not do this, instead instituting this action."*

[24] I have read this cited case and cannot find the passage quoted above in the decision and I therefore disregard this authority. The passage quoted appears to come from another case. Counsel making submissions should take care when citing authorities so as not to waste the Court's time by making incorrect references.

[25] The Respondent also referred to the decision of Byrne. J in **Fijian Teachers Association & Jone Lokega v Permanent Secretary for Education & Ors (2001) HBC 394/01S Judgment 22 November 2001** where it is submitted it was held:-

> *"Where identical question and relief already refused in earlier JR proceedings, plaintiff's Writ of Summons is scandalous and vexatious and is struck out. Plaintiffs are estopped from bringing action."*

[26] After citing a number of cases which illustrated circumstances of abuse of process of the Court the Respondent concluded that the Respondent was within its rights to apply for striking out as it was defending a statement of claim which was pleading the same cause of action the Appellant had abandoned in the Tribunal in 2017 which it submitted was simply an abuse of process.

Discussion

[27] Order 18 Rule 7(1) is not relevant to these proceedings. Order 18 Rule 18(1) unequivocally states that the Court may at any stage of the proceedings order that any pleading be struck out on the grounds that it is scandalous, frivolous or vexatious or it is otherwise an abuse of the process of the Court.

[28] In the High Court of Australia case **Lindon v Commonwealth of Australia (No 2) 136 ALR 251** which as noted above, the Judge referenced in his decision. Kirby. J stated the following at page 256.

> *"6. The guiding principle is, as stated in O 26, r 18(2), doing what is just. If it is clear that proceedings within the concept of the pleading under scrutiny are doomed to fail, the court should dismiss the action to protect the defendant from being further troubled, to save the plaintiff from further costs and disappointment and to relieve the court of the burden of further wasted time which could be devoted to the determination of claims which have legal merit."*

[29] This Court agrees with and affirms this principle in applying Order 18 Rule 18(1) of the High Court Rules. The application to strike out should be made as soon as it is clear the pleadings under scrutiny are bound to fail. This can be before a Statement of Defence is filed as in this case. Order 18 Rule 18(1) permits this. In is noted that the Respondent prayed in its Summons to Strike Out that the filing of its Defence be

stayed until seven days after the hearing and determination of its application. The Summons and the Affidavit in Support both disclose that the application is based on the contention that the claim is statute barred and that it is scandalous, frivolous or vexatious or that it is otherwise an abuse of the process of the Court.

[30] I find that the Judge did not err in law by entertaining the Respondent's application to strike out the Appellant's claim before a Statement of Defence specifically pleading the Statute of Limitation was filed. Ground one is misconceived and should be dismissed.

Ground 2

Submissions

[31] The Appellant contended at the commencement of his submissions in respect of this ground that it was important to note the following dates:-

a) The Appellant was summarily dismissed on 20/01/2010

b) The Appellant attended mediation on 26/04/2010 and 25/05/2010

c) The Appellant complied with Section 111(2) of the ERA and exhausted mediation on 26/04/2010

d) The grievance was referred to the Employment Relations Tribunal on 27/05/2010

e) The matter was before the tribunal for seven years until discontinued on 13/11/2017

f) The Appellant's Writ of Summons was filed on 10/07/2019

g) The Respondent filed an Acknowledgment of Service on 06/09/2020 and Striking Out Summons on 03/10/2019

h) Both parties filed written submissions on 11/11/2020

i) Two years later on 12/07/2022 the Judge struck out the matter on the basis that the claim was statute barred

[32] He submitted that the Judge was wrong when he concluded in paragraph 9 of his Decision that *"…the Plaintiff was very lax in prosecuting his case. There was no explanation why he did not prosecute his case between 19 March 2014 and 16 January 2016."*

[33] He further submitted that without a certified copy of the record of the tribunal the Judge could not lay the blame for the delay on the Appellant. He submitted there could have been other factors which caused the delay such as "institutional delay."

[34] He also submitted that the Judge was wrong in finding that there was no indication that an application was made to the tribunal to transfer the proceeding to the ERC under Section 218 of the Act without considering a certified copy of the record of the tribunal.

[35] He further submitted that:-

> *"14 Without limiting itself to the Employment Court lawsuit the Learned Judge was also wrong when he considered the action before him as scandalous, frivolous, vexatious and an abuse of the Court process by failing to direct his mind to the procedural history of the case before the tribunal through a certified copy record of the tribunal."*

[36] Citing **Attorney General v Halka [1972] Fj Law Rp 35; (1972) 18 FLR 210 (3 November 1972)** he submitted that:

> *"…the judge was wrong and failed to show that the cause of action was so clearly untenable that they could not possibly succeed…"*

[37] Finally the Appellant submitted that the Judge had failed to direct his mind and attention to a certified court record of the tribunal to fairly evaluate and assess the procedural history of the Appellant's grievance.

[38] The Respondent submitted that the Judge was correct to consider the Employment Grievance filed by the Appellant in 2010 which was "similar" to the High Court claim filed in 2019.

[39] It was further submitted that the Appellant filed employment grievance proceedings challenging his dismissal of 20 January 2010 and that these proceedings continued for 7 years before the Respondent applied to strike it out for abuse of process when there were numerous non-appearances by the Appellant or his counsel and failure to comply with directions.

[40] The Respondent noted that the Tribunal made "unless" orders in May 2016 when the Tribunal listed the times the Appellant failed to prosecute his claim and to appear in

Court for his own hearing. The Respondent was therefore within its rights to bring this to the Court's attention.

[41] The Respondent referred to the copies of the sealed orders of the Tribunal in 2016 and 2017 annexed to the affidavit of Richard Donaldson ("the Donaldson Affidavit") in support of the strike out application. They were signed and sealed by the Tribunal, it was submitted and were therefore conclusive proof of the orders granted.

[42] Further the Respondent submitted that the Appellant had failed to file an affidavit in opposition in the striking out application despite being given the opportunity to do so by the Court on 17 March and 1st July 2020 and submitted therefore that there can be no dispute to the fact of the orders.

[43] The Respondent referred to the case of **Sharma v The Chief Registrar [2019] FJSC 10; CBV0007.2018 (26 April 2019)** where the Supreme Court observed in relation to abuse of process at paragraph 30 of the Judgment that:-

> *"30. Abuse of Process is a Tort well recognized by the Common Law of England that has also been applied to prevent a party to a case from abusing the process of a court of law. Lord Denning explained the concept in Goldsmith v Sperrings Ltd [1977] 2 All ER 566, in the following words:-*
>
> *"In a civilized society, legal process in the machinery for keeping order and doing justice. It can be used properly or it can be abused. It is used properly when it is invoked for the vindication of men's rights or the enforcement of just claims. It is abuse when it is diverted from its true course so as to serve extortion or oppression; or to exert pressure so as to achieve an improper end.* ***When it is so abused, it is a tort, a wrong known to the law. The judges can and will intervene to stop it. They will stay the legal process, if they can, before any harm is done. If they cannot stop it in time, and harm is done, they will give damages against the wrongdoer****."(Emphasis added)"*

[44] In conclusion the Respondent submitted that it had incurred substantial legal costs, time and resources to defend the previous proceedings filed by the Appellant which involved the same claim filed in this matter so the judge was justified in dismissing the claim for abuse of process.

Discussion

[45] The essence of the Appellant's second ground is that Judge had erred in not considering a certified record of the proceeding of the Tribunal. This was not raised as an issue in the proceedings before him in the ERC. Indeed there was no request from either party for the Judge to consider a certified copy of the record of the tribunal. The Judge was therefore not required to consider a certified copy of the record of the Tribunal.

[46] The Appellant in his Statement of Claim set out the "procedural history" of the matter before the tribunal including that the grievor (Appellant) did not prosecute the matter, that on an interlocutory hearing of the matter, the matter was struck out and dismissed due to non-appearance and that on 13th November 2017 the matter was discontinued by the grievor (Appellant).

[47] The Donaldson Affidavit annexed copies of orders which confirmed this procedural history.

[48] The Appellant did not raise any issue with those orders in the ERC. He chose not to file an affidavit in response and did not raise any issue with the tribunal proceedings or orders in his written submissions in the ERC.

[49] The Appellant's submissions with regard to the application to transfer the proceedings to the tribunal have no basis as the Judge accepted that an application was made as the Respondent had not denied it. He did not follow through with that application however, likely because he did not have the grounds to make the application under Section 218(2)(a) and (b) of the ERA. These provisions provide that when an application is made to the Tribunal to have the proceedings transferred to the ERC for the hearing and determination of a matter, the Tribunal may order a transfer if it is of the opinion that an important question of law is likely to arise; or the case is of such a nature and of such urgency that it is in the public interest that it be transferred to the ERC. I cannot see how this matter would satisfy those requirements.

[50] I can also find no merit in the contention that the Judge was wrong in finding that the action before him was scandalous, frivolous, vexatious and an abuse of the process of Court by failing to direct his mind to the procedural history of the case before the

tribunal through a certified copy of the record. I find that the Judge was correct in finding on the material before him that the proceedings were vexatious and an abuse of the court.

[51] This ground has no merit and should be dismissed.

Ground 3

Submissions

[52] The Appellant firstly submitted that the Judge had "failed" to consider Section 211(2)(a) of the Act which limits the tribunals power to adjudicate on claims within its jurisdiction to a limit of $40,000.00 when he knew from the Statement of Claim that the Plaintiff's claim exceeded that limit. This issue was not raised in the Appellant's written submissions in the ERC and the Judge was therefore not required to consider Section 211(2)(a).

[53] The essence of the Appellant's remaining submissions in respect of this ground are contained in paragraphs 25 and 26 of his Written Submissions which read:-

> *"25. The computation of time excludes the 7 years in which the matter was before the tribunal thus the section 4(1)(a) of the limitation act does not apply.*
>
> *26. The learned judge failed to consider that the reckoned computation of time begins from the day the matter was discontinued in the tribunal and that section 4(1)(a) of the limitation act does not apply."*

[54] The Respondent submitted that the Appellant had abandoned his employment grievance filed in 2010 and then filed a similar High Court case with the same cause of action in 2019. It therefore cannot rely on the mediation of employment grievance filed in 2010 to overcome the Limitation period in the Limitation Act.

Discussion

[55] It was clear from the pleadings, including the affidavit and written submissions before the Court, that the proceedings before the tribunal had come to an end at the latest in 2017 when they were discontinued.

[56] As pointed out in paragraph 49 above, the Appellant did not follow through with his application under Section 218 of the ERA to transfer the proceedings from the tribunal to the ERC.

[57] The Writ of Summons filed by the Appellant in July 2019 were fresh proceedings. Counsel for the Appellant conceded this at the hearing before this Court. He also conceded before this Court that he did not have any authority for his contention that the computation of time must exclude the 7 years in which the matter was before the tribunal or that the computation of time begins from the day the matter was discontinued in the tribunal and that therefore Section 4(1)(a) of the Limitation Act does not apply.

[58] The action instituted by the Appellant in July 2019 is an action claiming damages for unfair and wrongful dismissal in breach of the terms of an employment contract. It was clearly an action to which Section 4(1)(a) applied. The action was brought more than six years after the date on which the cause of action arose therefore the action was statute barred.

[59] This ground of appeal is also misconceived and I conclude that it should be dismissed.

Ground 4

Submissions

[60] The Appellant submitted that the Judge failed to consider that in employment relationships, the procedures for grievance in the Act take priority over the High Court Rules and the Limitation Act. He did not provide any authority for this proposition.

[61] He also submitted that the Judge failed to distinguish between simple contracts and employment contracts. He suggested that because Section 110(1)(a) of the Employment Act provides that employment contracts must contain procedures for settling an employment grievance they are distinct from simple contracts under the Limitation Act. Again he did not provide any authority for this proposition.

[62] He further submitted that the "…rules of grievance procedure in the Act takes priority over Order 18 of the HCR 1988 and Section 4 of the Limitation Act 1971." once again

without providing authority or specifying the "rules of grievance procedure" he was referring to.

[63] He finally submitted that the Judge "…ought to direct its mind on exhausting the special provisions under Section 110 of the Act instead of implementing Order 18 of the HCR or Section 4 of the Limitation Act." He does not state what these "special provisions" in Section 110 are.

[64] The Respondent on the other hand submitted that the Appellant filed an employment grievance in 2010 following his dismissal which was discontinued. He then filed the current proceedings in the ERC. This case is based on a contract of employment and the law is clear that the limitation period in such a case is six years.

[65] The Respondent contended that both the discontinued matter before the Tribunal and the current case in the ERC originate from the termination letter in January 2010. The Respondent concluded its submissions on this ground in paragraph 3.33 of its Written Submissions as follows:-

> *"3.33 The Petitioner's High Court claim is similar to the employment grievance which also challenged his dismissal and which he and his lawyer filed and was in the Tribunal for 7 years which was dismissed for non-appearance and failure to prosecute with cost orders. So to file another High Court claim with 3 causes of actions based on the same contract and termination is simply an abuse of process. The High Court in his ruling analysed that striking out cases is an extreme measure unless there are substantial grounds for the Court to exercise its discretion and here there was sufficient evidence that the Petitioner's claim was simply vexatious and an abuse of process. The costs before the Tribunal of $1,000.00 and the High Court of $1,000.00 remain outstanding."*

Discussion

[66] There is no substance in the Appellant's submission at paragraph 60 above. Section 219 of the ERA establishes the ERC as a Division of the High Court. Section 25 of the High Court Act 1875 gives the Chief Justice power to make rules of Court carrying the High Court Act into effect including in Section 25(1)(a) for regulating the pleading, practice and procedure in the High Court in civil matters. There is no

provision in the Limitation Act which excludes employment contracts from the provisions of the Act. I reject this submission entirely.

[67] Although Section 110 of the ERA provides that an employment contract must contain procedure for settling employment grievances, it does not follow that an employment contract is therefore not a "simple contract" in terms of the Limitation Act 1971 as submitted without authority by the Appellant. There is no basis for this proposition, it is wrong and I reject it.

[68] Following the termination of his employment in January 2010 the Appellant reported an employment dispute under the ERA. The dispute proceeded to mediation and when mediation was unsuccessful to the tribunal as required by the ERA. The proceedings before the tribunal were ultimately discontinued on 29/11/2017.

[69] In the recent judgment of this Court in **ANZ Banking Group Pte Ltd v Sharma (2024) FJCA 29; ABU 30.2022 (29 February 2024)** this Court held that the ERC has jurisdiction under Section 220(1)(h) of the ERA to hear and determine a claim for unjustified or unfair dismissal founded on a contract of employment provided it is properly pleaded as such. This enables a claim to be made in the ERC where the damages claimed as in this case and in the ANZ case referred to above exceed the jurisdiction of the tribunal.

[70] The Appellant had the option therefore to discontinue his proceedings before the Tribunal and file a claim for damages for unfair and unjust dismissal founded on a breach of the terms of his contract of employment in the ERC.

[71] This option however must be subject to Section 4(1)(a) of the Limitation Act which provides that such an action founded on simple contract must be brought within six years of the date the cause of action accrued. That is in this case within six years of the 20th January 2010. The Appellant did not do this. By the time proceedings before the Tribunal were discontinued on 29/11/2017 and the claim in the ERC was filed one and a half years later on 10/07/2019 the Appellant's claim was already statute barred.

[72] I find this ground to be misconceived. It too should be dismissed.

Conclusion

[73] I have concluded that each of the Appellant's grounds are misconceived or have no merit. The appeal must therefore fail and be dismissed.

[74] I can find no basis to disturb the decision of the ERC as argued in the grounds of appeal.

[75] The Judge was correct to find on the basis of the material before him that the claim was statute barred and that the proceedings were vexatious and an abuse of the process of the Court.

Orders of the Court

1. *The Appellant's appeal is dismissed.*

2. *The Decision of the Employment Relations Court of the 30th June 2022 is affirmed.*

3. *The Appellant is to pay the Respondent costs in the sum of $2,000.00 within 21 days of the date of this judgment.*

Hon. Justice Chandana Prematilaka
RESIDENT JUSTICE OF APPEAL

COURT OF APPEAL FIJI

Hon. Justice Alipate Qetaki
JUSTICE OF APPEAL

Hon. Justice Walton Morgan
JUSTICE OF APPEAL

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