

IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

ORIGINAL JURISDICTION

CASE NUMBER: ERCC 07 OF 2011

BETWEEN: WILLIAM WONG

APPLICANT

AND: FIJI NATIONAL PROVIDENT FUND

RESPONDENT

Appearances: Mr. N. Tofinga for the Applicant.

No appearance for the Respondent.

Date /Place of Judgment: Wednesday 17 April 2013 at Suva

Coram: The Hon. Justice Anjala Wati.

RULING

1. The applicant by a motion requires the Court to :-

(a) Declare and determine that there is an employment contract in existence between the parties and whether or not the contract has been breached by the respondent by not allowing the applicant to commence employment in accordance with the contract.

(b) If breach is found, the respondent be compensated for full contractual period of 3 years.

(c) *Declare and determine that the respondent acted in bad faith and if such declaration is made the agreed 3 month notice period in the employment contract be extended to 24 months.*

2. The application was heard undefended. The respondent failed to file any response or appear on the hearing date to defend the case.

3. The grounds relied upon by the applicant are deposed his affidavit. He states that:

- *He was offered a position of Assistant General Manager Support Services (AGM/SS) at the FNPF by a letter dated 7 October 2007. He accepted the offer on 15 October 2007. After his acceptance of the letter he was constantly advised "to hang on for a while" by the Manager Human Resources.*
- *On 21 January 2010 he wrote to the General Manager seeking a firm commencement date to begin his employment. Subsequently he was granted an audience with the General Manager on or about the end of January or the first week of February 2010. The General Manager advised him that the employer would withdraw their offer. The withdrawal of the said offer was never officially and/or formally made to him.*
- *He engaged with the HRM on compensation for breach of the contract and missed potential opportunities elsewhere.*
- *On 10 January 2011 the respondent offered him a 3 months payment.*
- *He made a counter offer of 9 months pay as opposed to 2/3 of the entire salary claim made initially on or about 18 August 2011. Till date, the FNPF has remained silent on this offer despite following this counter offer with telephone calls and face to face meetings with the HRM.*

4. Mr. Tofinga argued that the reason why he resorted to High Court is the limitation on jurisdiction. The ERT has a jurisdiction of \$40,000 so he had to come to ERC. Going to mediation will undermine the applicant's position as the mediation cannot determine interpretation of any contract. The application is made to ERC under s.221 and s. 220(h)

of the ERP. Mr. Tofinga further argued that the ERP provides that the employer has a duty to provide work to its employees. The employer failed in its statutory duty to provide work and relayed the information very late. The employee therefore needs to be paid at the very least until 10 January 2011.

5. Mr. Tofinga further argued that the FNPF's reason for not employing the applicant was restructure of the organization. The FNPF should have foreseen at the time of signing the contract that restructure would take place so they cannot fail to provide work to the employee.
6. Mr. Tofinga argued that the duty of good faith existed and the employer acted in bad faith in not providing him with work and giving him a formal notice of termination of work.
7. The nature of the reliefs sought by the applicant requires me to carefully examine my jurisdiction. The first question that the applicant wants to have tried is whether there is an employment contract in existence between the applicant and the respondent. S. 211(1) (c) of the ERP states that the "*Tribunal has jurisdiction to adjudicate on whether a contract for service is a contract for service*". S.4 of the ERP clearly indicates that an employment contract includes an oral or written contract of service between a worker and an employer.
8. The ERP gives no power or jurisdiction to the ERC to specifically adjudicate on whether a contract of service is a contract of service.
9. S. 220(1) (h) states that the ERC has jurisdiction to hear and determine an action founded on an employment contract. This is quite a different power that to finding and adjudicating on whether a contract exists. S. 220(1) (h) requires the ERC to determine a cause of action based on the contract of service like on action for unlawful, wrongful or unfair dismissal.
10. S.220(1)(i) states that in proceedings founded on an employment contract the ERC has powers to make any order that the ERT may make under a written law or the law relating to contracts.

11. There again under s. 220(1)(i) the Courts obligation is to hear and determine the cause of action based on an employment contract, not to adjudicate an existence or non existence of a contract of employment.
12. The second matter the applicant wants the Court to try and find on is that the respondent has breached the contract and for compensation to be paid for the breach and the termination notice in the contract to be extended to 24 months in lieu of 3 months and an order that the employer has a duty to provide work. Do these reliefs come under the ambits of s. 220(1) (h) and (i)?
13. I am a little worried that the applicant is confused on procedure. He has brought a compliance order application and seeking for a declaration that the contract has been breached and for compensation to be paid. S. 220(1) (h), (i) require the applicant to bring an action on an employment contract.
14. The applicant has to file a proper claim under the contract of employment. There must be a cause of action under the contract. There is no cause of action in the claim before me filed in the motion.
15. Mr. Tofinga also asked that his application be amended to include that the respondent be ordered to comply with s. 24(a) of the ERP to provide work or compensation under s. 24(b) of the ERP.
16. Firstly the order to provide work for a period until the applicant was told that the offer of employment will be withdrawn is untenable. The arguable remedy is the compensation for a period for which the respondent was under a duty to provide work.
17. The respondent has not been served with any amendment and in such situation it is improper to allow the claim to be sustained. The application initially was never for compliance of a provision of the Promulgation. The new amendment is a different application, neither ancillary nor akin to the existing matter so the amendment is disallowed.
18. In any event, for the ERC to order compliance with a provision of ERP under its powers pursuant to s. 221(1)(a), the breach alleged, that is, the respondent was under a duty to provide work, the Court must be able to ascertain from the contract the commencement date of the employment. At this stage the applicant is asking initially for a declaration

that a contract exists so in my new it is ironical to ask for a compliance order under a provision of ERP.

19. I will not refuse to hear an action properly brought under the employment contract if it is so made but the manner in which it is made before this Court is either in foul of the jurisdiction or foul of the rules of procedure for a proper cause of action to be pleaded not forgetting that the amendment is disallowed.
20. I dismiss the application, hence with no order as to costs.

Anjala Wati

Judge

17.04.2013

To:

1. *Mr. N. Tofinga, for the Applicant.*
2. *The Respondent.*
3. *File: ERCC 07 of 2011.*