

IN THE HIGH COURT OF FIJI

AT SUVA

Civil Action No. HBC 79 of 2010

BETWEEN : **ADRIAN CLIFTON HAZELMAN** of 163 Clara Street, Corinda,
Queensland 4075, Australia, Retired.

PLAINTIFF

AND : **FIJI HARDWOOD CORPORATION LIMITED** a limited
liability company having its registered office at 6-7 Carpenters
Street, Garden City Building, Raiwai, Suva.

DEFENDANT

BEFORE : **Justice Deepthi Amaratunga**

COUNSEL : **Mr. G. O'Driscoll** for the Plaintiff
Mr. V. Kapadia for the Defendant

Date of Hearing : **24 February 2014**

Date of Decision : **25 February 2014**

DECISION

Catch words

Section 220 (1) of Employment Relations Promulgation- Section 30(2) of Essential National Industries (Employment) Decree 2011 (Decree No 35 of 2011). Action based on Common Law for breach of employment contract.

INTRODUCTION

1. The Plaintiff instituted an action in 2010 against the Defendant in the High Court for a claim based on breach of employment contract. In the statement of claim no mention of

Employment Relations Promulgation and the claim is based on the common law contractual obligation between the parties. The alleged breach happened in 2006. The hearing started yesterday and at the outset the counsel for the Defendant Mr. V. Kapadia raised a preliminary objection to the jurisdiction. Mr. O’Driscoll for the Plaintiff indicated that he was aware of the said objection and also anticipated it and was also informed of the said objection prior to the hearing and both parties made oral submissions. Since I have fixed the matter for hearing on consecutive days, after hearing both sides arguments adjourned for decision today.

2. The Defendants argument is solely based on legal interpretation of Section 30 of the Essential National Industries (Employment) Decree 2011 which terms as;

‘Certain decisions not to be challenged

30.-(1) No court, tribunal, commission or any other adjudicating body shall have the jurisdiction to accept, hear, determine or in any other way entertain any proceeding, claim, challenge or dispute by any person or body which seeks or purports to challenge or question—

(a) the validity, legality or propriety of this Decree;

(b) any decision of any Minister, the Registrar or any State official or body, made under this Decree; or

(c) any decision of any designated corporation made under this Decree.

(2) Any proceeding, claim, challenge or dispute of any nature whatsoever in any court, tribunal, commission or before any other person or body exercising a judicial function, against any designated corporation that had been instituted under or involved the Employment Relations Promulgation 2007 before the commencement date of this Decree but had not been determined at that date or is pending on appeal, shall wholly terminate immediately upon the commencement of this Decree, and all orders whether preliminary or substantive made therein shall be wholly vacated and a certificate to that effect shall be issued by the Chief Registrar or the registrar of the Employment Relations Tribunal.

(3) Where any proceeding, claim, challenge, application or dispute of any form whatsoever, is brought before any court, tribunal, commission or any other adjudicating body, in respect of any of the subject matters in subsection (2), then the presiding judicial officer, without hearing or in any way determining the proceeding or the application, shall immediately transfer the proceeding or the application to the Chief Registrar or the

registrar of the Employment Relations Tribunal for termination of the proceeding or the application and the issuance of a Certificate under subsection(2).

(4) A certificate under subsection (2) is, for the purposes of any proceedings in a court, tribunal, commission or any other person or body exercising a judicial function, conclusive of the matters stated in the certificate.

(5) A decision of the Chief Registrar or the registrar of the Employment Relations Tribunal to issue a certificate under subsection (2) is not subject to challenge in any court, tribunal, commission or any other adjudicating body.’ (emphasis added)

3. The counsel for the Defendant stated that in terms of Section 30(2) the High Court does not have jurisdiction to hear this action since the Defendant is now a designated corporation that falls under the purview of Section 30 of the Essential National Industries (Employment) Decree 2011 (Decree No. 35 of 2011).

ANALYSIS

4. It is admitted fact that the Defendant had been included as designated corporation in Essential National Industries & Designated Corporations (Amendment)(No.2) Regulation 2013. Prima facie the Defendant is governed by Section 30 of the Essential National Industries (Employment) Decree 2011 (Decree No. 35 of 2011). So the section is applicable to the Defendant, but that is not sufficient to terminate this proceedings. The mere fact that application of Section 30 to the Defendant not necessarily terminates all the actions against the Defendant. If that was the intention that could have been stated in the said provision, but it is not. Only a designated types of actions are ousted from the jurisdiction of courts, tribunals etc. As the heading of the Section 30 of Essential National Industries (Employment) Decree 2011 (Decree No. 35 of 2011) indicates only ‘*Certain decisions*’ of the Defendant will ‘*not to be challenged*’. The types of actions or decisions are exclusively spelt out in the said Section 30 and if the present action cannot be included in any of them this action cannot be terminated, despite

the Defendant being named as a Designated corporation under the Essential National Industries (Employment) Decree 2011 (Decree No. 35 of 2011).

5. The counsel for the Defendant has to satisfy that the present action can be included under the Section 30 of the Essential National Industries (Employment) Decree 2011 (Decree No. 35 of 2011). For that it needs to be established that this action was instituted or involved with Employment Relations Promulgation 2007.
6. The argument for the Defendant is based on the contention, that all the employment matters in High Court are instituted in terms of the Employment Relations Promulgation 2007(as amended). When I inquired as to the basis of his argument, he stated that he relied on Section 220(1)(h) of the Employment Relations Promulgation 2007 and stated that since the jurisdiction to deal with employment contact is conferred with the Employment Relations Court, this action is deemed a matter instituted under Employment Relations Promulgation 2007.
7. The Section 220 of the Employment Relations Promulgation 2007 states as:

Jurisdiction of the Employment Relations Court

220. — (1) *The Employment Relations Court has jurisdiction—*

(a) to hear and determine appeals conferred upon it under this Promulgation or any other written law;

(b) to hear and determine offences against this Promulgation;

(c) to hear and determine all actions for the recovery of penalties under this Promulgation;

(d) to hear and determine questions of law referred to it by the Tribunal;

(e) to hear and determine matters transferred to it under section 218(2);

(f) to hear and determine applications for leave to have matters before the Tribunal transferred to it under section 218(3);

(g) to hear and determine a question connected with an employment contract which arises in the course of proceedings properly brought before it;

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

(i) subject to subsection (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;

(j) to hear and determine a question connected with the construction of this Promulgation or of any other law, being a question that arises in the course of proceedings properly brought before the Court, notwithstanding that the question concerns the meaning of the Promulgation under which the Court is constituted or under which it operates in a particular case;

(k) to order compliance with this Promulgation;

(l) to hear and determine an application for a discontinuance of an order in respect of an unlawful strike or lockout under this Promulgation;

(m) to hear and determine proceedings founded on tort relating to this Promulgation; or

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

(2) In exercising its jurisdiction under subsection (1)(i) to make an order cancelling or varying an employment contract or a term of an employment contract, the Court must, notwithstanding anything in subsection (1)(h), make an order only if an order should be made and any other remedy would be inappropriate or inadequate.

*(3) **In all matters before it**, the Court has full and exclusive jurisdiction to determine them in a manner and to make decisions or orders not inconsistent with this Promulgation or any other written law or with the employment contract.*

(4) 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 (emphasis added)

8. The Section 220(1)(h) confers general jurisdiction of the Employment Relations Court regarding the ‘actions founded on employment contract’. The jurisdiction of matters found in Section 220(1)(a) to (n) spelt out the jurisdiction of the Employment Court but more importantly, it does not confer exclusive jurisdiction regarding any of the matters stated in Section 220(1)(a) to (h).

9. The exclusivity given in Section 220(3) is only when a matter is before the Employment Tribunal and not prior to that. That means the matters that confer

jurisdiction to the Employment Court are not exclusive and the person instituting the action can either file an action under Employment Relations Court or under common law in any court that exercises civil jurisdiction if it involves a breach of employment contract. If he had already filed an action in Employment Relations Court, then the jurisdiction of the said court becomes exclusive for that matter before it, and that exclusivity is confined to that matter which is before the Employment Relations Court only. This exclusivity to deal with specific matter is gained after the matter is before the said court and not prior to the matter is brought before the Employment Relation Court. If not, there is no reason to restrict the exclusive jurisdiction of the Employment Relation Court in the manner of Section 220(3) only to 'matters before it'.

10. So, I reject the Defendant's contention that Section 220(h) confers an exclusive jurisdiction to Employment Relations Court, so that all the matters instituted in High Court by virtue of said provision is deemed an action instituted under Employment Relations Promulgation 2007.
11. The counsel contended that since the Employment Relations Promulgation 2007 is a statutory provision it should be the first resort as a source of law, and any institution of action should necessarily be deemed an institution under said statutory provision. This argument does not hold water, as there are more than one example where statutory provisions and common law co-exist, even in the field of labour Law. An injury while at work can be determined under Workmen's Compensation Act, the statutory provision, or negligence under common law.
12. The choice is with the Plaintiff to file an action under Employment Relations Promulgation 2007 either in the Employment Relations Tribunal or Employment Relations Court regarding a breach of contract, or in a court that exercise civil jurisdiction (i.e High Court). Since this action is filed for breach of contract under common law this is not a matter instituted or involved with Employment Relations Promulgation 2007

13. The importance of this issue is paramount to the termination of the action in terms of Section 30(2) of the Essential National Industries (Employment) Decree 2011 (Decree No. 35 of 2011). The said provision only terminates matters that are instituted under or involved the Employment Relations Promulgation 2007 and if not, the action is clearly outside the purview of Section 30(2) of Essential National Industries (Employment) Decree 2011 (Decree No. 35 of 2011).
14. This action is based on a termination that was done in 2006. So unless the Employment Relations Promulgation 2007, has retrospective effect, this action could not have been instituted under the Employment Relations Promulgation 2007. I was not shown any such provision that confers retrospective jurisdiction, so the contention of the Defendant fails.
15. The Defendant's counsel relied on *FNPF vs Abineshwar Vinod* (ERCA No. 4 OF 2012) decided on 19 February 2014 (unreported) to argue that Section 30(2) has retrospective effect. This is a misconceived idea. What was in issue in that case was the date of commencement of amendment to Essential National Industries (Employment) Decree 2011. In that judgment Wati J held that date of commencement of amendment is the date of commencement of Essential National Industries (Employment) Decree 2011. To arrive at this conclusion relied on Section 11 of Interpretation Act. This retrospective effect cannot be expanded beyond 2007. According to said judgment the effective date of commencement is the date of commencement of principle enactment which is 2011 and the present action is outside this period.
16. Even if I am wrong on that, this action is instituted for breach of contract under common law and not under Employment Relations Promulgation 2007.
17. This analysis is not completed if I do not say anything about Section 30(3) of Essential National Industries (Employment) Decree 2011 (Decree No. 35 of 2011). It is pertinent to note that subject matter of said Section 30(3) is only confined to preceding provision Section 30(2) of Essential National Industries (Employment) Decree 2011 (Decree No. 35 of 2011). So, it seems that Section 30(3) is superfluous since it refers to Section

30(2) for its applicability of subject matter. There are few changes like ‘dispute of any form whatsoever’ and ‘any other adjudicating body’ which are not found in Section 30(2), but the subject matter remains identical to Section 30(2) . So, this provision cannot be relied for present issue as it is outside the subject matter of Section 30(2) for the reasons I have given earlier in this decision.

CONCLUSION

18. The preliminary objection overruled. The jurisdiction of this court is not ousted by virtue of the Section 30(2) of the Essential National Industries (Employment) Decree 2011 (Decree No. 35 of 2011) .It only ousted matters that are instituted or involved with the Employment Relations Promulgation 2007. The alleged breach of contract was in 2006 and clearly it does not cover. The trial proceeds forthwith.

FINAL ORDER

1. Preliminary objection to jurisdiction overruled.

Dated at **Suva** this **25th** day of **February, 2014**.

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Justice Deepthi Amaratunga
High Court, Suva