

**IN THE HIGH COURT OF FIJI**  
**WESTERN DIVISION**  
**AT LAUTOKA**

**Civil Action HBC 86 of 2008**

**BETWEEN** : **MOHAMMED SHAMSHER KHAN** son of Mohammed Sadiq of  
Lovu, Lautoka, Unemployed.

**PLAINTIFF**

**AND** : **PERMANENT SECRETARY FOR WORKS AND ENERGY**

**1<sup>ST</sup> DEFENDANT**

**AND** : **ATTORNEY GENERAL OF FIJI**

**2<sup>ND</sup> DEFENDANT**

## **R U L I N G**

### **INTRODUCTION**

- [1]. On 08 May 2008, the plaintiff (“**Khan**”), vide his then lawyers, Messrs Haroon Ali Shah, filed a writ of summons and statement of claim seeking general damages for wrongful termination from employment and a declaration that the defendant, being a public authority, was guilty of discriminatory practice in its selection of workers within the unestablished sector of the then Public Works Department.
- [2]. Khan pleads in the statement of claim, he worked at PWD from 1980 until December 2005 as an unestablished staff. He was “*terminated*” from employment for the reason that “no work” was available.
- [3]. He pleads at paragraphs 3 and 4 that:
  3. The terms and conditions of the Plaintiff’s service with the Defendants was covered by the Joint Industrial collective Agreement
  4. The terms and conditions of the Plaintiff’s service with the Defendants was covered by the Joint Industrial collective Agreement.
  5. The defendants termination of the Plaintiff’s employment was in breach of the said Joint Industrial Collective Agreement in that the longest serving member would be the last to go.
  6. The defendants have also discriminated against the Plaintiff in their selection process in that new workers have been absorbed into the service to the exclusion of the Plaintiff.
  7. In the premises the defendants have wrongfully terminated the Plaintiff’s service.

### **STATUS OF SUBSTANTIVE MATTER**

- [4]. The matter has been ready for trial since 05 September 2011 but Khan filed a Motion on 24 November 2011 to vacate the hearing dates. Copy pleadings were filed well before that which includes the completed pre-trial conference. Order in

Terms to vacate the hearing date was granted by Mr. Justice Fernando on 05 December 2011 and the matter was then adjourned to 01 October 2012 for mention to fix trial date. On 01 October 2012, Fernando J adjourned the matter to me (sitting then as Master) for mention on 05 November 2012. On 05 November 2012, the plaintiff appeared in person seeking a date in 2013 to get a solicitor (Haroon Ali Shah being then disbarred). The matter was again called before me on 21 January 2013,, 18 February 2013, 11 March 2013 and 10 April 2013.

### **APPLICATION FOR SPECIFIC DISCOVERIES**

[5]. On 18 April 2013, Khan filed an application under Order 25 and 24 Rules 7, 10 and 12 of the High Court Rules 1988 seeking specific discoveries.

1. That the defendants do within 14 days disclose to the plaintiff by affidavit the personal file of the plaintiff with each and every document intacted from the year 1980 to 2005 from the personal records office of the 1<sup>st</sup> defendant's office which was known as the public works department, building section.
2. That the defendants do within 14 days disclose to the plaintiff by providing certified true copies of the plaintiffs personal file with each and every document intacted from the year 1980 to 2005 from the personal records office of the 1<sup>st</sup> defendant's office which was known as the public works department, building section.

[6]. His affidavit in support simply deposes as follows:

1. That I am the plaintiff in this matter and have full rights to make this affidavit as the plaintiff in the matter acting in person.
2. That I have the full knowledge of this matter since my solicitor Messrs Haroon Ali Shah Esq has been disbarred from practice and has handed all my documents to me.
3. That I made several requests to the defendants about my **personal file** but the defendants has not responded to my request.
4. That I surely believe that my **personal file** is one of the major proof and exhibit to my case which will eventually assist me in this matter which is before the court.
5. That I pray for the order in terms of the Summons filed herein. The documents which are requested for are very relevant to determine the loss suffered by the plaintiff in this action.

### **DEFENDANT'S OPPOSITION**

[7]. The defendant opposes the application and has filed an affidavit of Adivuna Drikalu to that effect. Drikalu deposes as follows:

1. I am employed as the Senior Clerical Officer in the Office of the Attorney General and by virtue of my position I am qualified to swear to the particular contents of this Affidavit on behalf of the Defendants.
2. That I have read the relevant file relating to this matter together with the Writ of Summons and Statement of Claim and the Summons and Affidavit in Support for Specific Discovery and the matters deposed herein are within my own knowledge and/or obtained from the documents maintained in the relevant file and after being briefed by the legal officer in carriage of the file.

3. I crave leave to reply to the Affidavit of Mohammed Shamsheer Khan filed on 18 April 2013 for Specific Discovery.
4. The Plaintiff seeks discovery of his personal file and records of his employment from his Employer for the years 1980 to 2005. The Plaintiff claims that his personal file will assist him in this matter and the documents are relevant to determine the loss suffered by him.
5. I admit paragraph 1 of the Affidavit.
6. I accept the admission in paragraph 2 of the Affidavit.
7. I deny paragraph 3 of the said Affidavit and state that the Plaintiff has not attached supporting documents as proof of his "several requests" for his personal file.
8. In reply to paragraphs 4 and 5 of the Affidavit, the Plaintiff's personal file reference No JK 959 has already been disclosed to him and is part of the Agreed Bundle of Documents filed on 24<sup>th</sup> August 2011. This includes correspondences from the years 2001 to 2008.
9. That the onus is on the Plaintiff to identify clearly what other document or documents that he seeks to be discovered by the Defendants which he believes is in the Defendants custody or possession.
10. I verily believe that the documents sought by the Plaintiff are not relevant to the issues.

### **PLAINTIFF'S REPLY**

[8]. Khan deposes as follows in his affidavit in reply sworn on .....

1. That I crave leave to reply to Affidavit of Adivuna Drikalu of the Attorney General's Office, sworn on the 8<sup>th</sup> day of May, 2013 and filed on the 8<sup>th</sup> day of May.
2. That I admit paragraph 1 of the Affidavit.
3. That I nor admit neither deny the contents of paragraph 2.
4. That as to paragraph 7 I deny the whole contents as I had made several phone calls requesting the same to be furnished to me. This includes all correspondence such as all letters written against me and all other correspondence relating to the matter.
5. That I strongly deny the contents of paragraph 8 and have serious issues to that. The Plaintiff's personal file reference No. JK 959 has not been fully disclosed as referred in the paragraph 8 of the Affidavit of Adivuna Drikalu.
6. That the defendant needs to come with clean hands before the court rather than using legal tactics knowing that the Plaintiff is in person.
7. That the Plaintiff needs access to all correspondences including letters from the supervising officers, head of departments, head office etc. that were written against the Plaintiff Mohammed Shamsheer Khan intacted from the year 1980 to 2005 together with whole contents of the personal file with reference no. JK 959 of Mohammed Shamher Khan.
8. That the documents sought by the Plaintiff are very relevant and important to the plaintiff in order to proof his case whereas the defendants are surely aware of the importance these documents in question.
9. That I as the plaintiff in person pray and seek order in terms of my summons for specific discovery with maximum cost for this application from this honourable.

### **PRINCIPLES APPLICABLE**

[9]. Courts have a wide jurisdiction to order discovery and inspection of documents. Behind this robust approach, is the philosophy that, with proper discoveries, and the more discovery there is between the parties, the better disposed they are in

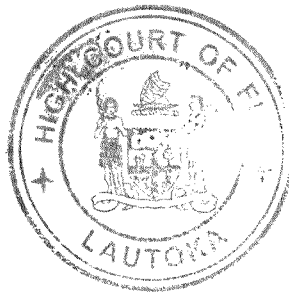
thrashing out the issues between them in the pleadings. Ultimately, the Court will be far better disposed to determine the real issues raised in the pleadings. This is cost effective in that it saves time.

- [10]. Discovery can be sought at any stage of a proceeding even after a judgement or order in an action has been made (see **Singh v Minjesk Investment Corporation Ltd & Anor** – High Court Civil Action No. HBC 148 of 2006 where Master Udit cited **Korkis -v- Wer & Co.**[1914] LT 794 as authority for this position).
- [11]. In **Singh v Minjesk**, Master Udit canvassed the applicable principles and case law authorities in some detail. From his analysis, what emerges clearly is that the onus initially is on the applicant to establish the following by way of affidavit evidence to:
- (i) identify clearly the particular document or documents or class of documents that he seeks from to be discovered by the opposing party (see Order 24 Rule 7(1)).
  - (ii) show a prima facie case that the specific document or class of documents do in fact exist or have existed (see Order 24 Rule 7(1)).
  - (iii) establish that these documents are relevant in the sense that they relate to the matter in question in the action. In other words, the information in the document must either directly or indirectly enable the applicant either to advance his own case or to damage the case of his or her adversary. Alternatively, it is sufficient if the information in the document is such that it may fairly lead to a train of enquiry which may have either of these consequences. The relevance of a document is to be tested against the issues and/or questions raised by the pleadings (see **A.B Anand (Christchurch) Ltd -v- ANZ Banking Group Limited** (1997) 43 FLR 22 30 January 1997).
  - (iv) it is important to note that whether or not any particular document is admissible or inadmissible is immaterial to its discoverability. It is enough if the document is likely to throw some light on the case (see Volume 13 paragraph 38 of Halsbury's Laws of England – 4th Edition) page 34 s cited in **Singh v Minjesk**).
  - (v) show that these documents were in the physical possession, custody (i.e. the mere actual physical or corporeal holding of the document regardless of the right to its possession) or power (i.e. the enforceable right to inspect it or to obtain possession or control of the documents from one who ordinarily has it in fact) of the opposing party (see Order 24 Rule 7(3)).
- [12]. An applicant will need to be heedful of accumulated case law material that Courts will not allow the discovery process to be used towards assisting a party upon a fishing expedition such as to fish for witnesses or a new case (see **Martin and Miles Martin Pen Co. Ltd v Scrib Ltd**[1950] 67 RPC 1-7 as cited in **Singh v Minjesk**), **Calvet -v- Tomkies** [1963] 3 All ER 610. Nor will discovery be ordered in respect of documents which are not related to or may not affect the actual outcome of the action: **Martin and Miles Martin Pen Co. Ltd. -v-**

**Scrib Ltd.** [1950] 67 RPC 1-7). Furthermore, discovery will also be prohibited if it is for a general purpose of enabling a party.

### **OBSERVATIONS**

- [13]. Khan is seeking discovery of his personal file. The defendants say his entire personal file has been disclosed to him. Whatever they have they have discovered to Khan.
- [14]. I am of the view that Khan's application is a fishing expedition for the general purpose of enabling him.
- [15]. For this reason I dismiss his application. Costs in the cause. This matter will be called for mention before me on **Thursday 04 September 2014** for mention to fix trial dates. For the record, I will also consider on the next mention date whether or not this matter should be referred to the Employment Relations Tribunal.



Anare Tuilevuka  
**JUDGE**  
28 August 2014.