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

Civil Action No.025 of 2011

BETWEEN : **ANANDA MAYA KUMARAN** of Nadi, Fiji, Campus Manager and Tutor

PLAINTIFF

AND : **UNIVERSITY OF SOUTHERN QUEENSLAND** a duly constituted University with its Head Office at Toowomba, Queensland, Australia.

DEFENDANT

Solicitors : Mishra Prakash for the Plaintiff
Gordon for the Defendant

RULING

INTRODUCTION

1. The background to this case is set out in an earlier interlocutory ruling reported in paclii in **Kumaran v University of Southern Queensland** [2011] FJHC 631; Civil Action025.2011 (30 September 2011). In that ruling, I had set aside a default judgement which had been entered irregularly against the defendant.
2. Notably, at the hearing of that earlier application, the defendant had gone to great lengths in putting together an affidavit of merits to support its alternative argument that, lest the court was of the view that the default judgement had been entered regularly, it had a meritorious defence which the court should consider. The evidence is not in dispute.
3. Before me is an application to strike out the statement of claim.

BACKGROUND

4. The plaintiff alleges that he was employed as a tutor for the University of Southern Queensland in Fiji.
5. His employment was terminated by a letter dated 25 November 2005. The letter in question was signed by one Ivan Williams who signed as Dean, USQICF.
6. The said letter, which is not in dispute and which was placed before me in the earlier proceeding, stated thus:

25 November 2005
Acting Campus Manager
USQ Nadi

Dear Mr. Kumaran

It is with great regret that I have to inform you that **the Directors of USQ International College Fiji** have **decided** to **discontinue campus operations in Nadi** as from 28 February 2006. Consequently **it is my sad duty to give you three months' notice of the termination of your appointment as Senior Tutor and Acting Campus Manager beginning 1 December 2005.** We would be grateful if you would continue to act in your dual capacity to the end of February 2006 and to help us to ensure that the wind down of our Nadi operations is accomplished efficiently and with minimum dislocation to the students' progress.

You will I know, be concerned about the welfare of your students consequent upon this decision. Those who have been studying full-time will be offered the opportunity to transfer to the Suva Campus or to continue their studies through our distance education system which is being strengthened. We are in the process of planning how the fullest possible support can continue to be offered in 'the west' to those who study part time or 'at a distance'.

The Directors have asked me to convey to you their sincere thanks for the great efforts you have made to make our Nadi Campus effective and efficient. **They acknowledge that it is of no fault of yours that we have been unsuccessful financially in Nadi.** Moreover, they recognize that the conditions under which you and your staff have worked for most of the past two years have been less that propitious. Your adaptability and resilience and your continued optimism have been impressive.

I trust that **this three months' notice** will give you time to secure the senior post you deserve with another organization, and I send you the Directors' best wishes for your future.

Yours sincerely

A. Ivan Williams
Dean, USQICF.
(my emphasis)

7. The plaintiff is seeking damages for unlawful termination of his employment contract. He sues the University of Queensland accordingly.

8. The issue which both counsel canvassed in the earlier hearing before me, and which is really the main one in the substantive matter between the parties, is whether the plaintiff was employed by the University of Southern Queensland.

9. The evidence placed before me in in the earlier proceedings is that a local entity called Chandra Williams Limited (**"CWL"**) had entered into an arrangement with USQ. The evidence before me is that CWL is a partnership between a Mr. Chandra and a Mr. Williams. The exact nature of CWL as a corporate entity (if it is) is unclear to me.

10. What I know is that in its Fiji operation, CWL would trade in the name USQ International College Fiji (**"ÜSQICF"**)
11. By that arrangement, USQ allowed CWL/USQICF to use USQ educational materials in teaching certain courses locally in Fiji leading to a USQ qualification on line.
12. The plaintiff's case theory depicts USQ as the principal that operated in Fiji through its local agent namely CWL/USQICF.
13. The evidence suggests that CWL/USQICF had promoted USQ's educational packages in Fiji as evidenced by their Agreement. USQ, however, asserts that that arrangement had nothing to do with the plaintiff's employment and that the plaintiff was in fact employed by CWL/USQICF.
14. The Agreement between CWL and USQ sets out clearly in **clause 13** of **Schedule Three** that all teaching staff are employed by CWL, although USQ reserved the right to veto and screen their appointment, obviously, for "quality control" purposes.

> Schedule Three
>
> **ADMINISTRATION**
>
> 13 **USQ reserves the right to screen teaching staff employed by Chandra Williams Ltd to teach into USQ programs.** Chandra Williams Ltd will forward CVs of teaching staff before the start of each teaching period for USQ's review. In the case of Faculty of Business courses, CVs should be emailed to wilsonc@usq.edu.au **USQ reserves the right to veto any Chandra Williams Ltd teaching appointment** it deems inappropriate to the USQ program. In each case USQ will inform Chandra Williams Ltd of the reason for this veto and Chandra Williams Ltd can appeal this decision where evidence is available that the teacher involved is acceptable in Chandra Williams Ltd's judgement. (my emphasis)

15. The letter of 25 November 2005 which terminated the plaintiff's employment was concluded and signed by Mr. Ivan Williams as Dean of USQICF. Based on this letter, the party that severed the plaintiff's employment was USQICF. Whether USQICF had acted on that occasion on the authority of/or as agent of USQ, no clear evidence was placed before me during the earlier proceedings.
16. A letter dated 4 October 2006 to USQ signed by Mr. A Ivan Williams as Dean and CEO of USQICF was also placed before me in the earlier proceedings. As I had observed, the said letter seemed to confirm that the managerial

prerogative of reducing the staff establishment did vest with SWL/USQICF. Below is the relevant extract from that letter:

> "We have moved the College from Harm Nam Building to the premises occupied by our own College for Higher Education Studies (CHES) thereby saving some $7,000 per month in rent. We have reduced our full- time staffing considerably.

17. As I had noted in the earlier ruling, no direct evidence was placed before me to suggest that USQ did in fact engage the plaintiff into the position of tutor/campus manager in the first place. On the contrary, the only letter of offer on record (see below) which the plaintiff had placed before me is the one dated 20 January 2004 from USQICF and signed by A. Ivan Williams on behalf of the Chandra/Williams partnership.

> (CHES Emblem on letter head)
> The temporary address of
> UNIVERSITY OF SOUTHERN QUEENSLAND INTERNATIONAL COLLEGE
>
> 197 Princess Road
> Suva
> 20 January 2004
>
> Mr. Ananda Maya Kumaran
> C/o NZPTC (TO BE COLLECTED BY Mr Kumaran)
> Sarju Prasad Building
> Vakabale Street
> Lautoka
>
> Dear Mr. Kumaran
>
> I have pleasure in offering you a post of Senior Tutor, at the Nadi campus of the USQ International College of Fiji, at a salary of $26,000 per annum. As student enrolments grow and finances allow, your remuneration will improve.
>
> We hope that, if you accept this offer, you will take up the post as soon as possible. Mr. Subhas Chandra particularly, is anxious that you start no later than Monday 26 January, and we are grateful to you for offering to undertake duties other than teaching as needs arise. It is essential that we market the USQICF vigorously and immediately, and we hope that this is something you would be willing to do.
>
> The functions and responsibilities of the position will be worked out during the next few weeks in discussions in which you would be involved if you accept this offer. A proper contract would then be drawn up.
>
> I would be grateful for your written response and, if you accept, I look forward to working with you in this exciting venture.
>
> Yours sincerely
>
> A Ivan Williams
> on behalf of the Chandra/Williams partnership.
>
> The College for Higher Education Studies P.O Box 3941 Samabula Suva Fiji
> Phone 3383669 or 3386732 Fax: 3383645 E-mail/;aidw@is.com.fj

COMMENTS

18. Before me is an application to strike out the statement of claim. The application is made pursuant to Order 18 Rule 18 Rule (1)(a), (b) and (d) of the High Court Rules 1988.

19. Order 18 Rule 18(1) of the High Court Rules 1988 states as follows:

> **Striking out pleadings and endorsements** (O.18, r.18)
> 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.

20. Generally, the Courts will exercise this jurisdiction under Order 18 Rule 18 rather guardedly. The reason why they would do so is best explained by Mr Justice Kirby in **Len Lindon –v- The Commonwealth of Australia (No. 2) S. 96/005** as follows:-

> It is a serious matter to deprive a person of access to the courts of law for it is there that the rule of law is upheld, including against Government and other powerful interests. This is why relief, whether under O 26 r 18 or in the inherent jurisdiction of the court, is rarely and sparingly provided.

21. The same principles are further reinforced in Fiji under section 15(2) of the 2013 Constitution which gives to every party to a civil dispute the right to have the matter determined by a court of law.

> *Access to courts or tribunals*
> 15.—(2) Every party to a civil dispute has the right to have the matter determined by a court of law or if appropriate, by an independent and impartial tribunal.

22. To demonstrate the extent to which the Court must adopt a guarded attitude, Kirby J went on to say as follows in **Len Lindon**:

> An opinion of the Court that a case appears weak and such that is unlikely to succeed is not, alone, sufficient to warrant summary termination... even a weak case is entitled to the time of a court. Experience teaches that the concentration of attention, elaborated evidence and arguments and extended time for reflection will sometimes turn an apparently unpromising cause into a successful judgment
> ....

If, notwithstanding the defects of pleadings it appears that a party may have a reasonable cause of action which it has failed to put in proper form, a Court will ordinarily allow that party to reframe its pleading

23. Where an application to strike out is based on the allegation that the statement of claim discloses no reasonable cause of action, the Courts will look only at the facts as pleaded and, assuming them to be proved, ask whether the plaintiff could succeed on his claim.

24. It is only in exceptional cases where, on the pleaded facts, the plaintiff could not succeed as a matter of law or where the cause of action is so clearly untenable that it cannot possibly succeed will the courts act to strike out a claim. If the facts as pleaded do raise legal questions of importance, or a triable issue of fact on which the rights of the parties depend, the courts will not strike out the claim. (as per Mr. Justice Kirby in Len Lindon -v- The Commonwealth of Australia (No. 2) S. 96/005).

25. If the application is based on an allegation that the claim is scandalous, frivolous and/or vexatious, the Courts will strike out the claim if it is factually weak, worthless or futile.

26. The White Book Volume 1 1987 edition at para 18/19/14 states as follows:

    Allegations of dishonesty and outrageous conduct, etc., are not scandalous, if relevant to the issue (Everett v Prythergch (1841) 12 Sim. 363; Rubery v Grant (1872) L. R. 13 Eq. 443). "The mere fact that these paragraphs state a scandalous fact does not make them scandalous" (per Brett L.J. in Millington v Loring (1881) 6 Q.B.D 190, p. 196). But if degrading charges be made which are irrelevant, or if, though the charge be relevant, unnecessary details are given, the pleading becomes scandalous (Blake v Albion Assurance Society (1876) 45 L.J.C.P. 663).

27. If a particular pleading alleges a fact which is scandalous, the court should not strike out the pleading if the fact alleged therein is relevant and material.

28. A scandalous fact could still be relevant and material if it would be admissible in evidence to show the truth of any allegation in the pleading which is material with reference to the relief prayed (per Selbourne L.C. in **Christie v Christie** (1873) L.R. 8 Ch. App 499, p. 503; and see **Cahsin v Craddock** (1877) 3 Ch. D. 376;**Whitney v Moignard** (1890) 24 Q.B.D 630).

29. In **Brooking v Maudslay** (1886) 55 L.T 343, plaintiff pleaded allegations of dishonest conduct but stated in his reply that he sought no relief on that

ground. The allegations thus became immaterial, and were struck out as scandalous and embarrassing.

30. Whether a particular pleading is embarrassing depends on the form of the action. Thus, averments in aggravation of damages may be, and often are, made in actions for tort, but may not be properly made in actions for breach of contract except in three cases mentioned by Lord Atkinson in **Addis v Gramophone Co. Ltd** [1909] A.C. 488, p. 495.

31. In **Bullen, Leake and Jacobs: Pleadings and Precedents** 12th edn at page 145, it is there stated that a pleading or an action is frivolous when it is without substance, is groundless, fanciful, wasting the Court's time, or not capable of reasoned argument.

32. A pleading is vexatious when it is lacking in *bona fides*, is hopeless, without foundation, and/or cannot possibly succeed or is oppressive.

33. The Courts will strike out a claim for abuse of process if its processes are not being used in good faith and for improper purposes. For example, the use of the court's process as a means of vexation or oppression or for ulterior purposes or where its process is being misused will be ground to strike out a claim for abuse of process.

34. Courts will rarely find that there is an abuse of process unless it concludes that the later proceedings amount to "unjust harassment". In the English case of Goldsmith v Sperrings Ltd [1977] 2 All ER 566, Lord Denning said as follows at 574.

35. In Broxton v McClelland [1995] EMLR 485 at 498 Simon Brown LJ said:

> Only in the most clear and obvious case will it be appropriate upon preliminary application to strike out proceedings as an abuse of process so as to prevent a plaintiff from bringing an apparently proper cause of action to trial.

36. In **Cooper v Public Trustee Corporation Ltd** [2004] FJHC 250; HBC0082d.2000s (13 October 2004) – Pathik J said:

> As to what is an abuse of process the following passage from Halsbury's Laws of England 4th Ed. Vol. 37 para 434 is apt:
>
> > "An abuse of the process of the court arises where its process is used, not in good faith and for proper purposes, but as a means of vexation or oppression or for ulterior purposes, or more simply, where the process is misused. In such a case, even if the pleading or endorsement does not offend any of the other specified grounds for striking **out**, the facts may show that it constitutes an abuse of the process of the court, and on this ground the court may be justified in striking **out** the whole pleading or endorsement or any offending part of it. Even where a party strictly

complies with the literal terms of the rules of court, yet if he acts with an ulterior motive to the prejudice of the opposite party, he may be guilty of abuse of process, and where subsequent events render what was originally a maintainable action one which becomes inevitably doomed to failure, the action may be dismissed as an abuse of the process of the court."

37. In **Bradford & Bingley Building Society v Seddon** [1999]1 WLR 1482, Auld LJ in a judgment with which Nourse and Ward LJJ concurred said at p.1492:

> "As Kerr LJ and Sir David Cairns emphasised in Braggs v Oceanus Mutual Underwriting Association (Bermuda) Ltd [1982]2 Lloyd's Rep. 132, 137, 138-139 respectively, the Courts should not attempt to define or categorise fully what may amount to an abuse of process; see also per Stuart-Smith LJ in Ashmore v British Coal Corporation [1992] QB 338, 352. Sir Thomas Bingham MR underlined this in Barrow v Bankside Agency Ltd [1996] 1 WLR 257 stating at page 263 B, that the doctrine should not be circumscribed by unnecessarily restrictive rules since its purpose was the prevention of abuse and it should not endanger the maintenance of genuine claims; see also per Saville LJ at page 266 D – E".

38. In **Manson v Vought and Others** [1999] BPIR 376, May LJ said at p.388:

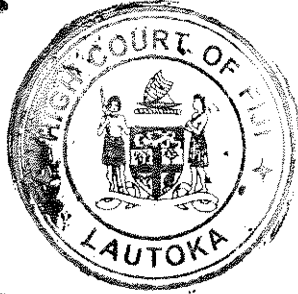
> "Abuse of process is a concept which defies precise definition in the abstract. In particular cases, the Court has to decide whether there is abuse sufficiently serious to prevent the offending litigant from proceeding".

CONCLUSION

39. Based on the material that is already before me, the plaintiff's case, in my view, would appear to be rather weak.
40. However, as Kirby J had cautioned, an opinion of the Court that a case appears weak and is unlikely to succeed is not, alone, sufficient to warrant summary termination.
41. Even a weak case is entitled to the time of a court.
42. It seems clear to me that USQ is not privy to the contract of employment between the plaintiff and CWL/USQICF. However, the plaintiff is entitled to his trial day to adduce evidence that CWL/USQICF was in fact USQ's agent in Fiji. The principal triable issue to be determined is whether or not there was a principal/agent relationship between USQ on the one hand and CWL/USQICF on the other. Once this is determined, then the issue becomes whether or not the plaintiff has established his claim that USQ is therefore liable to him (plaintiff) for damages including consequential damages for breach of the employment contract.
43. I note that the Plaintiff has not bothered to join CWL/USQICF as defendant.

44. I dismiss the summons/strike out the claim. Costs in the cause.

45. Case adjourned to 17 August 2016 for mention.



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Anare Tuilevuka
JUDGE

12 August 2016