In the High Court of Fiji
At Suva
Civil Jurisdiction

Civil Action No. HBC 08 of 2017

Air Pacific Limited trading as Fiji Airways

Appellant

Ana Vakasawaqa

First respondent

v

Malakai Gucake

Second respondent

Counsel: Mr Nilesh Prasad for the appellant

Mr R. Vananalagi for the first respondent

Ms L. Jackson for the second respondent

Date of argument: 5th December,2018

Date of Judgment: 10th May,2019

Judgment

1. The appellant appeals from a Ruling of the Master of 3 August, 2018 declining to strike out the first respondent's writ of summons and the statement of claim. On 15th October,2018 all parties agreed by consent that leave be granted from the order.

2. The first respondent, a flight attendant employed by the appellant claims damages from the first and second respondents for injuries sustained. The second respondent is a Pilot with the appellant. The appellant, in its statement of defence denies the claim and stated that the claim under the Workmen's Compensation Act,(WCA) is statute barred.

3. The appellant, filed summons to strike out the claim on the ground that it does not disclose any reasonable cause of action against the appellant under Or 18,r 18(1)(a). Alternatively, that it is scandalous, frivolous or vexatious, an abuse of process under Or 18,r 18(1)(b) and (d) and the alleged cause of action is statute barred under section 25(1) of the WCA.

4. The affidavit in support of the summons states that the appellant lodged a LD Form C/1 with the Ministry of Labour. The Ministry advised the appellant that the net compensation payable to the first respondent was $17,156.26. The appellant and the first respondent signed LD Form C/9 titled *"Form of Agreement as to Compensation to be paid by this Employer"* on 13 November 2015.

5. The first respondent, in her affidavit in reply states that she did not sign the LD Form C/9 nor were its *"terms and effect"* explained to her by the Labour Officer. She was *"only called by the Labour Officer on 13 November 2015 to pick up the cheque..which was given to me in the stairs outside the Labour Office.. the cheque was brought in from Suva through CDP courier which arrived late"*. There was no discussion with the appellant in respect of the compensation payable. The dates on the agreement of 13 November,2015 are contradictory.

6. The Master dismissed the application to strike out the claim.

7. The appellant appeals on the following grounds:

i. *The Learned Master erred in law and in act at paragraph 6 of the Ruling in proceeding upon the basis that there were "Five (5) issues" to be deliberated upon in determining the Appellant's summons to strike out the claim, and thereafter setting out four (4) issues only. Further, the Learned Master erred in law in proceeding upon the basis that the issue to be determined were by reference to the "Defendant's Statement of Defense" as opposed to the "Plaintiff's Claim".*

ii. *The Learned Master erred in law in finding, at paragraph 11 of the Ruling, that the Applicant was required to establish that "the Plaintiff does not have a cause of action".*

iii. *The Learned Master erred in law and in fact in failing properly to construe, analyse and/or make findings with respect to the Appellant's contention that the action is statute barred pursuant to section 25(1)(c) of the Act, and/or the Master's conclusion on this point was plainly wrong based on the facts that:*

a) *On 28 May, 2014 the Appellant lodged a LD For C/1 comprised in the Second Schedule of the Act with the Ministry of Employment, Productivity and Industrial Relations ("the Ministry") to report the injuries alleged to have been suffered by the First Respondent in connection with the hard landing of aircraft FJ911 at the Kingsford Smith International Airport, Sydney, Australia ("the Accident").*

b) *By letter dated 13 October 2015 the Ministry advised the Appellant that based on Dr. Joeli Mareko's assessment of the Plaintiff he found a 12% degree of permanent incapacity. Based on this assessment the Ministry assessed net compensation payable at $17,156.26 in accordance with section of the Act.*

c) *On the 19 October 2015 the Appellant wrote to the Ministry enclosing a bank cheque in the sum of $17,156.26 payable to the Ministry; and*

d) *The Appellant and the First Respondent then signed LD Form C/9 called the "Form of Agreement as to Compensation to be paid by this Employer" dated 13 November 2015 counter-signed by the Ministry on 17 November 2015. The settlement was approved by the Permanent Secretary for Employment, Productivity and Industrial Relations, Salaseini Serulagilagi Daunabuna.*

iv. *The Learned Master erred in law at paragraph 23 of the Ruling in first accepting as evidence that the First Respondent was paid the sum of $17,156.26 under the Act as compensation with respect to the Accident, and thereafter finding that the question of whether the First Respondent's claim was thereby statue barred was a question to be decided at trial.*

v. *The Learned Master erred in law at paragraph 25 and 26 of the Ruling, in finding that the Appellant could not submit that the First Respondent's claim was statute barred before the Plaintiff's claim and evidence was tendered and determined at trial.*

vi. *The Learned Master erred in law at paragraph 28 of the Ruling in finding that the Appellant needed to establish that the First Respondent's claim "lacks merits" [sic] (whatever that means).*

vii. *The Learned Master erred in law and in fact at paragraphs 33 and 34 of the Ruling in finding that the First Respondent's claim was filed "within the 3 years' timeframe as required under in law" and therefore was not statute barred, when this was not an issue properly before the Master for determination.*

viii. *The Learned Master erred in law and in fact at paragraph 36 of the Ruling in finding that even if the First Respondent's claim was statute barred the court had the discretion to allow the claim to proceed out of time on application when:*

(a) This was not an issue properly before the Master for determination; and/or

(b) The finding is plainly wrong in light of the wording in section 25(1) of the Act.

The determination

8. The central issue raised in this appeal is whether the Master erred in failing to find that the first respondent's action is statute barred under section 25(1)(c) of the Act. The appellant contends that the Master, while accepting that the first respondent was paid a sum of $17,156.26 under the WCA as compensation, erred in reaching a conclusion that the question of whether her claim was statue barred was a question to be decided at the trial.

9. At the hearing, Ms Jackson, counsel for the second respondent supported the appeal.

10. Section 16(1) of the WCA provides that an employer and a workman may "*agree, in writing, as to the compensation to be paid by the employer*" with the written approval of the Permanent Secretary for Labour or a person appointed by him.

11. The section further provides that if the workman is unable to read and understand the language in which the agreement is expressed, *"the agreement shall not be binding against him unless it is endorsed by a certificate of a district officer or a person appointed by the district officer or Permanent Secretary, in writing, ..that he read over and explained ..the terms ..and that the workman appeared fully to understand and approve of the agreement"*.

12. Section 16(3) provides that any party may apply to cancel the agreement within three months, if it is proved that the sum is not in terms thereof; the agreement was entered into in ignorance of, or under a mistake as to the injury; or, the agreement was obtained by such fraud, undue influence, misrepresentation or other improper means as would, in law, be sufficient ground for avoiding it.

13. Section 25(1)(c) provides that an agreement between the *"between the employer and the workman under the provisions of subsection (1) section 16 shall be a bar to the proceedings by the proceedings by the workman in respect to the same injury independently of this Act."*

14. Mr Prasad, counsel for the appellant argued that section 25(1)(c) is a bar and precludes a workman from claiming compensation for damages in a civil court. He relied on the decisions in ***Siqila v Fiji Development Bank,***[2000] FJHC 86 HBC 0348J.1998S(25 July,2000), ***Singh v. Emperor Gold Mining Company Ltd,*** [2004] FJHC 512 and ***Lincoln Refrigeration Ltd v Prasad,*** Civil Appeal No. ABU24 of 2017(5th October,2018)

15. I will in the first instance refer to the Ruling in ***Siqila v Fiji Development Bank,*** [2000] FJHC 76; HBC0348D.1998S(20 June,2000). In that case, the section 16 agreement had been signed by both parties, witnessed by a Labour Officer, read over to the plaintiff in Fijian and approved by a person authorised by the Permanent Secretary, but the plaintiff denied that it was properly explained to him. Shameem J declined to dismiss the action at the preliminary stage and stated:

> ***..there appears to be an agreement that satisfies the requirements of section 16. However the Plaintiff claims he did not understand what he was signing and that the Labour Officers acting for him did not explain the procedures to him.***
>
> ***In the circumstances I am unable to conclude that the agreement is a valid agreement under section 16 of the Act and would prefer to hear further evidence on the way the agreement was executed..*** (emphasis added)

16. The subsequent judgment in that case provides that the plaintiff's evidence was contradicted by the testimony of a witness, who said that he had explained the agreement to the plaintiff in Fijian and told him that the agreement prevented him from taking further proceedings against his employer. Shameem J concluded:

> *section 25 ..create(s) a statutory bar to civil action against the employer in respect of the same injury* ***provided section 16 was complied with***...
>
> *In all the circumstances,* ***and having heard the evidence in this case****, I consider that the Plaintiff has been compensated, under the Workmen's Compensation Act, for his injury and that this claim is statute-barred.*(emphasis added)

17. The Court of Appeal in ***Siqila v. Fiji Development Bank,*** [2002] FJCA 43 Civil Appeal No. ABU0059 of 2001S (15th November,2002) stated:

> *Section 25 (1)(c) is plainly a conclusive bar to the appellant's present claim ... we note that* ***the trial Judge examined the question and was satisfied that the appellant was informed and understood at the time of signing the agreement that the making of the agreement would bar legal action for the recovery of damages for his injury.*** *.."* .(emphasis added)

18. In ***Singh v. Emperor Gold Mining Company Ltd,*** (*supra*) Connors J stated that "*On the basis of the admissions made by the plaintiff, I am satisfied that the plaintiff and the defendant entered into an agreement pursuant to section 16 (1) of the Workmen's Compensation Act.*".

19. The facts in ***Lincoln Refrigeration Ltd v Prasad,*** (*supra*) are not comparable. In that case, it was argued that the Labour Officer had practiced duress on the workman. The Court of Appeal held that in the absence of evidence to establish duress/undue influence, the workman is bound by an agreement or representation made by such authorized person. The Court also stated that the requirement for the workmen to sign the agreement is a "*super added requirement not laid down in Section 16*".

20. In my view, section 16 clearly requires the agreement to be signed by the workman, as Kumar J, (as he then was) held in ***Prasad v Lincoln Refrigeration Ltd*** , Civil Action No. HBC 10 of 2015(24th February,2017) at para 3.17.

21. The principles to be derived from the cases cited is that the Court will not take the drastic step of dismissing a claim without hearing evidence.

22. In ***Dey v Victorian Railways Commissioners,*** (1948-49) CLW 62 at pg 84 -85 Latham CJ said:

> *..the summary procedure.. was appropriate only to cases which were plain and obvious, so that any master or judge could say at once that the statement of claim was insufficient, even if proved, to entitle the plaintiff for what he asked..**If, as a result of argument, the court reaches a clear decision which could not be altered by any evidence which could be adduced at the trial, then it is proper in the interests of both parties to dismiss the action instead of allowing the parties to incur completely useless expense.*** (emphasis added)

23. Lord Pearson in ***Drummond -Jackson v. British Medical Association,*** [1970]1 All ER 1094 at 1101 said *"the power to strike out a statement of claim as disclosing no reasonable cause of action is a summary power which should be exercised only in plain and obvious ..I think reasonable cause of action' means a cause of action with some chance of success".*

24. In the present case, the first respondent, in her affidavit states that she did not sign the *"Form of Agreement as to Compensation to be paid by this Employer"* nor were its *"terms and effect"* explained to her by the Labour Officer. I note that there is a certificate from a *"District Officer/Labour Officer or other person authorised"* that the terms of the agreement were read over and explained to the workman.

25. Be that as it may, since the first respondent claims that she did not sign the agreement, I am unable to conclude that a valid agreement under section 16(1) was executed and as such, it was a bar to the proceedings under section 25 without hearing evidence, as Shameem J reasoned in ***Siqila v Fiji Development Bank,*** (*supra*).

26. In the light of my conclusion, the Master was correct in holding that evidence has to be tendered at the hearing and it cannot be held that there is no reasonable cause of action nor that the claim is scandalous, frivolous, vexatious and an abuse of the court process, although he failed to discuss the crucial issue arising from the relevant provisions of the WCA and dealt with issues not before him, as urged in the seventh and eighth grounds of appeal.

27. The appeal fails.

28. *Orders*

(a) The appeal of the appellant fails.

(b) The appellant shall pay the first respondent costs in a sum of $ 750.

A.L.B.Brito-Mutunayagam
Judge
10th May,2019