IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

ORIGINAL JURISDICTION

CASE NUMBER:	**ERCC 17 OF 2018**
BETWEEN:	**SAMUELA BULAVAKARUA**
	PLAINTIFF
AND:	**MINISTRY FOR EDUCATION, HERITAGE AND ARTS**
	DEFENDANT
Appearances:	*Mr. D. Nair for the Plaintiff.*
	Ms. Solimailagi, O. and Ms. Ali, M. for the Defendant.
Date/Place of Judgment:	*Friday 27 September 2019 at Suva.*
Coram:	*Hon. Madam Justice Anjala Wati.*

A. Catchwords:

Employment Law – Employee summarily dismissed for inflicting corporal punishment on children – whether the dismissal is lawful: an examination of the reasons for dismissal and the procedure in carrying out the dismissal – any form of violence on children amounts to a breach of the supreme law of the country and is a serious conduct prohibited by law – the employer has established a lawful cause to dismiss the employee – the procedure in carrying out the dismissal complied with – whether the plaintiff could directly file a case in the ERC without first referring the matter to mediation- mediation not a prerequisite for filing of matters in the ERC – employee has a right to directly file a grievance in ERC.

B. Conventions/Legislation:

1. *The United Nations Convention on the Rights of the Child.*
2. *The Constitution of Fiji ("CF"): ss. 15(2); 41(1)(d); and 41(2) .*
3. *The Crimes Act 2009: Division 5.*
4. *The Employment Relations Act 2007 ("ERA"): ss. 30(6); 33(2); 34; 110(3); 114; 188(4); 194(5); 200(1)(a); 211(1)(k), 211(2)(a); 218 (2); and 220(h);*

Cause/Background

1. The plaintiff has filed a claim seeking a declaration that the termination of his employment as a school teacher for inflicting corporal punishment on some children is unlawful, unjustified and manifestly harsh.

2. The plaintiff sought a further declaration that the defendant's failure to refer the plaintiff to Public Service Disciplinary Tribunal before terminating him is procedurally unfair, lacks impartiality and independence and is in breach of the principles of natural justice. This part of the claim was withdrawn by Mr. Nair on the day of the hearing.

3. The plaintiff taught in Lomary Catholic Primary School. He was under a term of contract which was for a period of 5 years commencing mid-August 2017 to beginning of August 2022. The incident of inflicting corporal punishment on the children occurred on 31 May 2018. One child's parent complained of the incident. The plaintiff did not at the time nor does he now deny the incident.

4. He was issued with an initial letter of termination on 12 July 2018 which stated that the effective date of the termination was 12 June 2018. A day after, on 13 July 2018, another letter of termination was issued to correct the effective date of termination as 13 July 2018.

5. The defendant has also filed an application to have the claim struck out. The parties agreed that the affidavit materials are sufficient to argue the substantive cause filed by the plaintiff and the application for striking out as well. Both the applications were heard together.

6. I must make it very clear that both parties were given a chance to produce the deponents of the affidavits to ascertain further relevant evidence and/or to be cross-examined. Neither party considered that oral testimony was necessary to advance their case. The matter was therefore heard on papers.

Law and Determination

7. I will deal with the interlocutory application first as the findings will decide whether or not a determination on the substantive cause is required.

A. Striking Out

8. The defendant's application to strike out the claim is based on the grounds that s. 188(4) of the ERA requires that an employment grievance against an essential service and industry must be dealt with in accordance with Parts 13 and 20 of the ERA.

9. The defendant's counsel contends that Part 13 contains a mandatory provision in s. 110(3), requiring that all employment grievances **must first be referred** for mediation services as set out in Division 1 Part 20. Since the provision is mandatory, the counsel for the defendant says that the plaintiff ought to have first lodged his claim in the Mediation Unit before it was filed in the Employment Relations Court ***("ERC")***.

10. The defendant's position is that the filing of the claim in the ERC is premature and beyond its jurisdiction.

11. I do not agree with the position taken by the state counsel for reasons I will expound. Before I do that I will state the provisions of s. 188(4) of the ERA which reads as follows:

"Any employment grievance between a worker and an employee in essential services and industries … shall be dealt with in accordance with Parts 13 and 20, provided however that any such employment grievance must be lodged or filed within 21 days from the date when the employment grievance first arose, and-…"

12. My first concern is in relation to the argument that all matters must be first referred to for mediation under s. 110(3) of the ERA. On the face of the requirement, there does not appear to be any problem in first referring the grievance to the Mediation Unit. However, in reality, a litigant always has to make a decision on where he or she would file the claim, that is, either in the Employment Relations Tribunal ***("ERT")*** or the ERC unless one of these institutions are excluded by law as the forum to resolve the grievance.

13. When such a choice has to be made and the party making the choice wishes to file his or her claim in the ERC then the requirement of the law to first refer the matter to the mediation

will give rise to a lot of complications and in some cases extinguish the right of a litigant to file the claim in the ERC altogether.

14. I will explain the position in detail. Let us take this case as an example. The plaintiff is a school teacher by profession with an annual salary of 19,000. One of the remedies that he seeks is for reinstatement which is within the powers of the ERT. The alternative remedy that he seeks is for payment of the wages for the balance of the contract.

15. The worker in this case had 4 years of contract term left. His claim therefore exceeds a monetary claim of $40,000 at the rate of $19,000 per annum. Whether an award is made in his favour to that extent or not, is not necessary in determining the forum to file the claim. His claim will decide whether he files an action in the ERT or the ERC.

16. If this plaintiff was to refer his claim first to the Mediation Unit as required by s. 110(3) of the ERA, and if his claim did not resolve at the Mediation Unit, by the process mandated under the law, his claim would be sent to the ERT. S. 194(5) of the ERA makes it mandatory that ***"if a Mediator fails to resolve an employment grievance or an employment dispute, the Mediator shall refer the grievance or dispute to the Employment Relations Tribunal". Underlining is mine.***

17. If the matter is transferred to the ERT in this case, then the ERT will be required to adjudicate on the matter as required by s. 211(1) (k) of the ERA. In this case, the ERT will have no option but to strike out the case because on the face of the claim, the same is beyond its jurisdiction. One has to note that the ERT's jurisdiction is limited to adjudicating claims up to $40,000 as required by s. 211(2) (a) of the ERA. However, the litigants normally do not classify the remedy they are seeking in the ERT. This argument will however not assist the defendant on reasons that I will provide later.

18. If the claim is struck out, the plaintiff will not be able to file another claim in the High Court under s. 188(4) (a) and (b) of the ERA which reads:

"...(a) where such an employment grievance is lodged or filed by the worker in an essential service and industry, then that shall constitute an absolute bar to any claim, challenge or proceeding in any other court, tribunal or commission; and

(b) where a worker in an essential service and industry makes or lodges any claim, challenge or proceeding in any other court, tribunal or commission, then no employment grievance on the same matter can be lodged by that worker under this Act".

19. I find that the provision of s. 188(4) (a) and (b) above has the effect of avoiding duplicity of claims and also the effect of barring second actions once a forum is chosen and the proceedings either abated or not dealt with on merits for one reason or the other.

20. Coming back to this case, if the plaintiff chose to file the matter in the Mediation Unit, he would be stuck by his choice to remain in the ERT and limit his claim to the jurisdiction of the ERT because if he or she withdraws the claim, a second action cannot be filed on the same grievance. Since parties appearing in the Mediation Unit and the ERT do not normally specify the remedy they are seeking in terms of the monetary value, the claim in that situation, on the face of it, will not be beyond the jurisdiction of the ERT but the litigant may not always be of the mind to claim lost wages less than $40,000. In that situation, referral of matters to the Mediation Unit will be an obstacle and deprive the litigant of the right to choose the correct forum to be able to claim the proper remedies. There are enough instances where the litigants specify the remedies they are seeking.

21. If a litigant mentions in the ERT or outlines his claim in the ERT and if the ERT finds that the claim intended to be specified will go beyond its jurisdiction, it will have no option but to strike out the matter. Once the claim is struck out, the claimant will not be able to have access to justice either in the ERT or the ERC. A second claim, I have said before, cannot be filed in the ERC.

22. Even in the remotest circumstances, if I am wrong in saying that a second claim is prohibited by the provisions of the law, by the time the plaintiff files a second claim in the ERC, his time of 21 days to file or lodge a claim as required by s. 188(4) would have expired. There

be the complication of time limitation. I do not think that in that situation the claimants can argue that they had already initially filed the claim within 21 days but that it was not determined. The 21 days rule applies to the pending claims before the court and whether that pending claim was lodged within 21 days.

23. My analysis above shows how first referring the matter to the Mediation Unit is not workable in situations like this and that it creates complications in procedure. Since there is no clarity in the procedure and the parties want to wriggle out of the claim by raising procedural defects, I find that the benefit of the complication must be given to the claimants who want to have their rights vindicated in court.

24. It is the duty of the legislature to outline clear and accurate procedures for use in court. If that is not done and the litigants are bereft of simple guidelines then access to justice must be granted to them and not denied because of such complexities in the legislation.

25. Ms. Solimailagi argued that if the matter is not resolved by the Mediation Unit, it would then end up referring the case to the ERT. She says that if the ERT finds that the matter is beyond its jurisdiction then the ERT can always transfer the matter to the ERC for determination of the claim.

26. This argument is fundamentally flawed in law. If the ERT determines that it does not have jurisdiction to hear the claim then the only option it is left with is to strike out the matter. Transferring the matter to the ERC amounts to exercising jurisdiction in the matter. That is the position of the law that I understand it to be.

27. Moreover, the ERT is a creature of the statute and its powers are found in the statute. The ERT only has statutory powers to transfer cases to ERC in limited circumstances as stipulated by the legislation itself. The circumstances are stipulated by s. 218 (2) of the ERA. S. 218(2) does not provide for the powers to transfer matters which are beyond the jurisdiction of the court. S. 218(2) reads:

"The tribunal may order transfer of the proceedings to the court if the tribunal is of the opinion that –

(a) an important question of law is likely to arise; or

(b) the case is of such a nature and of such urgency that it is in the public interest that it be transferred to the court".

28. A situation where the claim exceeds the jurisdiction of the court does not fall either in the category of an important question of law arising in the matter nor does it fall under any sort of urgency or public interest factor to be transferred. I therefore find Ms. Solimailagi's suggestion of a way out after being found in the ERT with a matter beyond the ERT's jurisdiction untenable.

29. I also wish to direct my attention to s. 200 (1) (a) of the ERA which refers to the kind of matters that **may** be referred to the mediation services and it includes an employment grievance as well. S. 200(1) (a) uses the word **may** unlike s. 110(3) which uses the word **must**. Whilst section 110(3) falls under Part 13, s. 200 falls under Part 20.

30. S. 188(4) says that the employment grievance must be dealt with accordance with Parts 13 and 20. The provisions on employment grievances to be first referred to the mediation unit, though, exists under both parts 13 and 20, the directions in both the provisions are not equally of the same nature. S. 110(3) makes it mandatory that the grievances be first referred to the mediation unit whilst s. 200(1) (a) grants the discretion on the person filing the grievance to choose whether he or she wishes to first go for mediation.

31. I thus do not find that an employment grievance under s. 188(4) must be first referred to the mediation unit before it is filed and that even if the process was compulsory, I do not find that any prejudice has been caused to the defendant in vindicating its rights before the court.

32. If a party is prejudiced by the matter not being referred to the Mediation Unit, an application could have been made to stay the proceedings until the process is exhausted. To ask for the claim to be struck out for want of referring the matter to the mediation unit is denial of access to justice to a litigant and a draconian order which does not assist any party to the cause.

33. In a matter like this, there is little point in referring the claim for mediation. The employer has taken a decision to terminate the employment contract for breach of its long standing policy on zero tolerance on inflicting corporal punishment on children. There is hardly any result that can be achieved through a process of mediation in a matter of such nature.

34. Ms. Solimailagi has not indicated to me that the defendant has been prejudiced due to the matter not being referred to the Mediation Unit. She has not made any mention about the defendant wishing to see if mediation could resolve the grievance. I think this is one case where the ministry requires adjudication of the issue as it concerns national interest due to the need to protect the rights and well-being of the children of the country.

35. Further, I do not feel that mediation is a prerequisite for adjudication of matters in the ERC. There is no provision close to requiring this although it is desirable that parties consider settling employment grievances before coming to court. One must not forget that where the employer is an essential national industry, there is hardly any time to invoke mediation if a party wishes to bring the claim in the ERC.

36. I also wish to add that s. 220 (h) grants the court with powers to hear and determine an action founded on an employment contract. S. 220 falls under Part 20 of the ERA. S. 188(4) requires that an employment grievance must be dealt with in accordance with parts 13 and 20 which to me mean the applicable provisions of Parts 13 and 20 and not all the provisions which do not apply or cannot be applied.

37. If a party files an action in ERC, that party is asking for its case to be dealt with under Part 20 and not procedures provided under any other inapplicable part. The claim therefore cannot be said to be filed outside the requirements of s. 188(4) of the ERA.

38. I find that the most important right of an employee is to have access to justice. Even if procedural niceties are not met; the court ought to attempt to save the right to access to justice and not deny the same. The principle is paramount and also embedded in the Constitution of Fiji: ***S. 15(2).***

B. Is the Dismissal Lawful?

39. I do not find that there is any basis to strike out the cause and as such I now turn my attention to the substantive issue of whether the termination was lawful. There is no complaint that the termination was carried out unfairly and in a manner that was humiliating, degrading, or in any other way that affected the dignity of the worker or caused injury to his feelings.

40. In order to determine the lawfulness of the termination, I will look at the reasons for the termination and the procedure invoked in carrying out the same. I will first cast my attention to the reasons for the dismissal.

41. The plaintiff was dismissed for inflicting corporal punishment by slapping four students during lunch hour inside the classroom on 31 May 2018. One child Master Manueli Lingairi went home and complained to his parents about the pain he was undergoing.

42. According to the parents the child did not eat his dinner due to the pain and his mother took him to the hospital in the morning of 1 June 2018. The father of the child then raised the complaint which gave rise to the investigation where the plaintiff admitted hitting the four students on the grounds that they had dropped lunch in the classroom and that they needed to be disciplined.

43. There is no denial that the plaintiff assaulted the children. The plaintiff is justifying the act on the grounds that the students needed to be disciplined and that his intention was for the benefit of the children. His counsel also asserts that the child whose parents complained of the incident did not receive any injuries and that there are no medical reports to substantiate any injuries.

44. What the plaintiff and his counsel conveniently overlook is that the defendant has made it very clear in writing through its Circular Number 33-18 dated 29 March 2018 titled ***"zero tolerance to corporal punishment"*** that any act of corporal punishment will be regarded as a serious misconduct. The contract of employment by clause 10 makes it very clear to the plaintiff that he may be dismissed for misconduct.

45. I think it is very essential that I recite the essential parts of the circular which was issued from the Permanent Secretary for Education, Heritage and Arts to the Divisional, District Offices, All School Heads and HR Staff:

"Dear Colleagues

1.0 ***As you are aware, the Government has a zero tolerance approach to corporal punishment in our schools and all teachers and employees of the Ministry must comply with this. This is in line with the Convention on the Rights of a Child which Fiji ratified in 1993.***

2.0 ***Please note our policies available on our website specifically:***

- ***Policy on Child Protection in Schools.***
- ***Policy on Behaviour Management in Schools.***

3.0 ***Where an allegation is received that a teacher or other staff member has imposed corporal punishment on a student, this will be treated as a serious misconduct issue and we will immediately investigate the matter in accordance with the Public Service Discipline Guidelines. The matter should also be reported to the local police post for investigation and possible criminal charges.***

4.0 ***Any staff member of the Ministry who becomes aware of an incident of corporal punishment has an obligation to report the incident immediately to the Head of the School, the District office or the Manager – Performance and Discipline in the HR Department.***

5.0 ***All staff are reminded of our joint responsibility for ensuring that the welfare and wellbeing of all students are protected at all times".***

46. The plaintiff does not deny that he was aware of Circular No. 33-18 on zero tolerance to corporal punishment. He knows that corporal punishment was not to be inflicted on the children. What he argues however is that the circular is not a law and that corporal punishment is not defined in the circular.

47. The circular is a policy that is issued by the state and it imposes on the people bound by it a duty and standard of ethics to be followed. If there is breach; the employer has the right to take an action for the breach.

48. There is no rescue in asserting that the circular is not a law. In that regard hitting any child amounts to assault and an offence under Division 5 of the Crimes Act 2009. Since the plaintiff does not deny the assault, he has admittedly breached the law for which the defendant has a right to deal with him as its employee.

49. Corporal punishment in this country has always meant to include any physical punishment. Any form of beating including slapping a child amounts to physical punishment. I firmly believe that every school teacher knows this and that no one has insisted for a definition of the term corporal punishment since the issuance of the circular because it is common knowledge in this country that a teacher is not supposed to hit or assault a child in any form. Even the students or the children know of this rule. I am surprised that the plaintiff is not aware of what the term meant.

50. If the plaintiff was not sure of what amounts to corporal punishment he ought to have had that clarified because it was fundamental for him to acquire this knowledge for the performance of his duties according to his contract.

51. One child experienced pain after being slapped and he suffered the consequences of the assault. The child underwent violence. The Constitution of Fiji ***('CF")*** guarantees a child's right to be free from any form of mental and physical violence. S. 41(1) (d) states that ***"every child has the right to be protected from abuse, neglect, harmful cultural practices, <u>any form of violence</u>, inhumane treatment and punishment, and hazardous or exploitative labour; and..."***

Underlining is mine.

52. The plaintiff is an educated professional dealing with children. He ought to know the rights of the children protected by the CF. His attempt to rely on the lack of definition of corporal punishment does not assist him.

53. The Circular No. 33-18 also mentions the United Nations Convention on the Rights of the Child. Like the CF, the Convention prohibits all forms of violence on children. The plaintiff is expected to know of the provisions of the Convention as well.

54. I do not find that the triviality of the violence inflicted on the child matters. Mr. Nair seems to suggest to me that the plaintiff only slapped the child once and that there were no injuries on the child. The mischief that the CF, the Convention on the Rights of the Child and the circular no. 33-18 is trying to protect is not to inflict any form of violence on the children. In any given case, it matters not, whether the child receives injury. It also matters not, the intention of the person who causes the physical punishment.

55. If permission was to be granted to the school teachers to hit the students but not cause them injury, the teachers will always justify their acts by saying that they hit the child slowly and that there are no injuries. What may appear to be a simple slap to the teacher may be a very painful and sensitive issue for the child depending on the child's age, health, mental status and the part of the body where the slap lands.

56. How are the teachers expecting the state to stop this menace? Is the state expected to relinquish its duty to protect the citizens of this country and its duty as the upper guardian and parents of all children by allowing the children to be assaulted? Is the state expected to categorise what forms are violence are permitted on children? Is the state expected to sanction violence of children? Is simple slapping good violence because it disciplines a child? Who is to assess that the slap has benefited the child then done him damage.

57. The step that this country has taken to eradicate any form of violence on the children is in line with international standards and worthy of applaud.

58. There are other ways to discipline children and as a school teacher the plaintiff ought to be aware of the policies which the Circular No. 33-18 also mentions in clause 2.0. If the plaintiff wishes to disregard the policy of the state and do what he wishes to then he is definitely not suitable to the position to look after the interest of the children of the state.

59. It is not only about physical injury that matters. Effect of any form of violence in school on a child by a teacher can last for years. A child can be emotionally disturbed due to the physical punishment. Not only the child who undergoes the punishment can be affected long term but those who witness violence also suffer the effect of the same. This tends to affect the work of the children and their relationship with the teachers, adults and people in authority.

60. In determining the rights of the employee, I must not forget that the best interest of the child is the primary consideration: ***S. 41(2) of the CF***. I find that the plaintiff had committed breach of the policy of the employer and also the law and that his actions of beating the children amounted to serious misconduct which I find is a lawful cause to summarily bring to an end his contract of service.

61. If these sorts of actions of inflicting violence on children are not controlled strictly then the policy of the state to protect the children from all forms of violence will never be respected by anyone. The policy and the law needs judicial codification and strict adherence to it will only ensure progress.

62. The next matter that I need to look at is whether the procedure to carry out the summary dismissal was followed. The first requirement is to provide the worker with written reasons for dismissal at the time of the dismissal.

63. The plaintiff was issued with a first letter of dismissal on 12 July 2018. The defendant says that it was an error when the letter of dismissal stated that the dismissal was to take effect from 12 June 2018. The defendant says that that letter was withdrawn due to the error in the effective date which was correctly raised by the Acting Head Teacher of Lomary Catholic School. As a result another termination letter was issued to the plaintiff on 13 July 2018 making the effective date of termination as 13 July 2018.

64. The plaintiff does not deny receiving the letter of 12 July 2018 in which written reasons for dismissal was given in it. In that regard I find that the defendant had provided the written reasons for the dismissal of the plaintiff as required by s. 33 (2) and s. 114 of the ERA.

65. The plaintiff in his affidavit has raised that the second letter of termination was given to him on 16 August 2018. Even if that is so, the plaintiff cannot deny that he got through the letter of 12 July 2018 the written reasons for the dismissal which is the requirement of the law deemed fulfilled.

66. The question of when the termination became effective will have a bearing on the next procedural requirement of the law which is that an employee is entitled to be paid on dismissal wages due up to the time of his dismissal and in this case up till 12 July 2018: ***s. 34 of the ERA.*** There is no allegation in the affidavit that the plaintiff was not paid his salary up until the effective date of the dismissal and as such I do not find that there was procedural non-compliance in this regard.

67. The other procedural requirement is found in s. 30(6) of the ERA which states that ***"upon the termination of a worker's contract or dismissal of a worker, the employer must provide a certificate to the worker stating the nature of employment and the period of service"***. There is no allegation in the affidavit on this aspect. I cannot rely on any other evidence tendered from the bar table.

68. The plaintiff was being summarily dismissed. In cases of summary dismissal, the plaintiff cannot assert a right to be heard. The employer can effect dismissal based on the information it gathers from its own investigation. In this case the plaintiff has admitted the allegations. The employer was entitled to act on his admission to carry out the dismissal which I find was based on a lawful cause.

69. Even though the plaintiff is not successful in his substantive cause, I find that since he is unemployed, an order for cost against him is not justified.

Final Orders

70. In the final analysis I find that the defendant's application for striking out does not have any merits and I dismiss the same. I find that the plaintiff's dismissal was lawful and fair. I dismiss his claim challenging the dismissal. I order each party to bear their own cost of the proceeding.

Anjala Wati
Judge
27. 09.2019

To:

1. *Mr. Nair for the Plaintiff.*
2. *Office of the Attorney- General for the Defendant.*
3. *File: ERCC 17 of 2018.*