

IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

ORIGINAL JURISDICTION

CASE NUMBER: ERCC 18 of 2020

BETWEEN: **NIKHAT SHAMEEM**

APPLICANT/PLAINTIFF

AND: **THE FIJI HIGHER EDUCATION COMMISSION**

RESPONDENT/DEFENDANT

Appearances: Mr. A. Singh for the Applicant/Plaintiff.

Respondent/Defendant Not Served.

Date/Place of Hearing: Tuesday 30 June 2020 at Lautoka.

Date/Place of Judgment: Wednesday 1 July 2020 at Lautoka.

Coram: Hon. Madam Justice Anjala Wati.

RULING

(Ex-parte Application – Injunction: Restraining Order against Employer)

Catchwords:

Employment Law – allegations of misconduct against employee – disciplinary process against employee invoked - investigator appointed to determine the allegations – in the middle of the investigation the employee resigns – investigation continues – investigation establishes that 3 out of 5 allegations are proved – investigator recommends termination – employer requires employee to mitigate on a particular day and come that day the employee files an application requiring that the employer be restrained from considering or implementing the investigation report or terminating the employment – factors for grant of preliminary injunction considered and application refused.

Cause/Background

1. The plaintiff has filed an ex-parte application against her employer seeking to restrain it from considering or implementing the report of the investigator dated 24 June 2020 who was appointed by the employer as part of the disciplinary process against the employee to investigate on allegations of misconduct. An order is also sought to restrain the employer from terminating the employment contract of the plaintiff.
2. It is clear from the proceedings papers that the parties are or shall I say were in an employment relationship beginning 1 October 2018. The contract was for a term of 3 years to end on 30 September 2021. The plaintiff was appointed to the position of the Deputy Director of Operations/Quality Assurance.
3. Subsequently, the plaintiff was appointed to the post of an Acting Director on 23 January 2019. The position was to take effect from 4 February 2019 until the substantive position was filled through a competitive process.
4. Following certain allegations on the conduct of the plaintiff's performance of her duties, the employer appointed an investigator to investigate the merits of the allegations. I understand from the investigation report that the employer made an initial contact with the investigator on 20 January 2020.
5. The allegations against the plaintiff were that the plaintiff had:
 - i. *Paid her spouses air fare to Sri Lanka from the employer's funds without any prior approval or authorization contrary to the Financial Operations Policy;*
 - ii. *Split purchase orders contrary to Financial Operations Policy;*
 - iii. *Harassed and bullied employees contrary to the Prevention of Discrimination and Harassment Policy;*
 - iv. *Renewed contracts where employees had been deemed "unacceptable" contrary to the Employment Contracts Policy; and*

v. *Issued warning notices to employees contrary to the Disciplinary Procedures Policy.*

6. On 4 February 2020, the plaintiff wrote to the employer and raised concerns on the delay in assessment of her application for the substantive post of the Director. She again raised a formal grievance on 7 February 2020 which largely touched on issues of not considering her initial grievance, not considering her application for the substantive post, acting ultra vires and not complying with the requirements of a performance assessment report.
7. On 10 February 2020, the plaintiff was suspended from her duties with normal salary and benefits except for any payments that was payable on her being physically present at work or performing services. She was also informed that the allegations against her will be investigated. The details of the investigator was not revealed. According to the investigation report, the plaintiff was formally notified of the appointment of the investigator on 21 February 2020.
8. I gather from the investigation report that the oral hearing of the plaintiff had begun on 23 April 2020. The matter was set for continuation of the hearing on 10 June 2020. The report outlines the various matters which caused the delay in the investigation. I will not go into the details of the same at this stage of the proceedings.
9. On 9 June 2020, the counsel for the plaintiff advised the investigator that the plaintiff did not wish to proceed with the oral interview as she had given her resignation to the employer and that her resignation would now render the investigation irrelevant and redundant. Upon receiving verification from the employer on the fact of the resignation, the investigator was of the view that since the plaintiff had given 30 days' notice, the investigator could proceed with the investigation and conclude the same. Since no contrary response was maintained by the plaintiff's counsel, the investigator took it that the counsel was in agreement with that position.
10. The investigation report was provided to the plaintiff on 25 June 2020. It is dated 23 June 2020. The plaintiff was informed that since the investigator had found 3 allegations against her as being established and that termination of her contract was recommended, she was to appear before the Commission on 29 June 2020 at 10.00am for mitigation and that if she

failed to attend, the Commission was going to proceed to make its decision based on the findings of the investigator.

11. It is on the day the plaintiff was required to appear before the Commission to mitigate when this application for the restraining orders were filed against the employer.

Plaintiff's Position

12. The plaintiff says that on 4 and 7 February 2020, she raised internal grievances with her employer. It responded by setting 4pm of 10 February 2020 for the full Commission meeting with the sole agenda of hearing her grievances but instead of her grievances being addressed, she was suspended from her employment on allegations which were not known to her before the suspension. She was advised that there would be an independent/external investigation of the allegations.
13. Since the suspension, the employer has aggressively resisted all her attempts to have the matter mediated and/or resolved through the Labour Tribunal. The resistance to mediate, she avers, is contrary to the dispute resolution procedure of the employer.
14. The plaintiff contends that the employer has not invoked fair and regular procedures to resolve the allegations or to have the matter investigated against her.
15. The plaintiff also makes allegation against the investigator for:
 - i. *Not being independent in that the investigator had provided legal advise to the employer in the same matter and drafted the charges against her too. This is prejudicial to her and puts the investigator in a conflicting and a biased position.*
 - ii. *Not addressing her on the allegations thereby insinuating to her that the investigator did not have any incriminating allegations to put to her for an answer to be provided;*
 - iii. *Not providing her a right to hearing and to cross examine the witnesses thus denying her the right to natural justice and fair hearing as per the employers disciplinary procedures;*
 - iv. *Not providing her with a right to challenge the findings;*

- v. *Not providing her the right to mitigation before making a finding of guilt; and*
- vi. *Usurping the powers of the employer by making a decision of her being guilty of the allegations when the role of the investigator was to investigate facts than to evaluate the same.*

16. According to the plaintiff, she endured four months of anxiety and depression and she felt that she had no option than to resign from her position which she did on 1 June 2020 giving the employer a month's mandatory notice, the last day of which is the 30 June 2020.

17. The plaintiff says that on 9 June 2020 she has filed a claim for constructive dismissal against the employer. She was served on 25 June 2020 with the investigation report requiring her to appear before the Commission on 29 June at 10.00 am to mitigate. She is fearful that the defendant is intending to terminate her employment and if she is terminated as per the report, she will suffer further humiliation, grief and irreversible professional reputational damage. She also asserts that she has recently been interviewed for two other comparable positions and the termination will cause her difficulties in getting appointed to either position.

18. It is her position that the sudden rush by the employer to conclude the disciplinary process and to terminate her contract a day before her resignation comes in force is designed to malign her name so that she loses her credibility and integrity. She believes this is also an attempt to detract her from the instances of unethical behavior by certain members of the Commission.

Analysis

19. Admittedly, I have not had the luxury of time to outline in depth the law governing grant of such matters. There was no assistance from counsel on this aspect either. In my view, given the time restraint, it is sufficient if I outline the factors which must be considered and established in such cases:

- i. *If the evidence remains the same, there is probability, that at the trial, the applying party will be entitled to relief or in other words likely to succeed on the merits;*

ii. *That the claimant is likely to suffer irreparable harm in the absence of the preliminary relief for which damages will not be adequate compensation;*

iii. *That the balance of equities tips in the claimant's favour; and*

To these limbs, a further important rider must be added, namely the interests of justice. It is important, in my view, that the question of whether there is a serious question not be considered in isolation from the issue of the balance of convenience.

20. On the first factor, I must say that this is not a classic case for an ex-parte injunction. I am of the view that the employer should have been served in this case so that to the very least the court is able to assess its position in terms of what the likely evidence would be to make a preliminary assessment on the merits of the claim.
21. The affidavit material does not show to me why an ex-parte application was necessary over the inter-partes application. What prejudice would the plaintiff suffer if the application was served has not been addressed by her.
22. I do not find that in this case, the evidence is likely to remain the same. Given the investigation report, I am of the view that the allegations of the plaintiff regarding the malicious intent of the employer, the unfair disciplinary process, the biased investigator and so forth would be addressed. It is therefore premature for me to make an assessment on the merits of the claim at this stage.
23. On the issue of the plaintiff suffering irreparable damage for which damages would not be an adequate compensation, I find that from her perspective she has ended the employment relationship. In that regard, she appreciates that the relationship has ended and that she will no longer go back to the same position or one that is no less advantageous to her.
24. Her concern is that if the employer is allowed to end the relationship, she will suffer irreversible reputational damage and also irreparable damages for loss of prospective employments. She herself has claimed damages for these matters in her substantive claim.

How the employer's termination of her employment will bring her irreparable reputational and career damage has not been established through the affidavit except for bare statements being made. There is no evidence to establish such statements. I note that the plaintiff does not proffer matters like the loss of employment affecting her livelihood and property that monetary damages will not adequately compensate her.

25. Let me now analyse the rights of the parties. This brings me to the factor "*in whose favour does the balance of convenience lie*"? Let me discuss the position of the employer first. The employer is a statutory body. It has the contractual and the statutory right to summarily dismiss an employee for gross misconduct. Given the allegations against the plaintiff, it had started the disciplinary process to ascertain whether the employee had breached the contract of employment. That right cannot be curbed or circumvented by an employee by resigning from the employment. It is the right of the employer to treat the resignation as not having taken effect and proceed to complete the disciplinary process. Of course, in this case that right could not be curbed as the investigator proceeded to conclude the matter.
26. However she still seeks that the employer does not complete the disciplinary process. Given that the employee has ended the contract of employment from her perspective and does seek reinstatement as a remedy, can the employee effectively preclude the employer from completing the disciplinary process and carrying out the decision of termination, should it be of the view that the same is warranted? I find that to do so is to deprive the employer of the contractual and statutory right of carrying out the due process in a disciplinary action.
27. The plaintiff participated in the investigation process for some time and then resigned in the middle of the investigation. She did not come to court when the investigation against her had started and completed. She could have when she says that the whole process was tainted from the beginning. It is only when the results of investigation are out that she seeks its consideration and implementation be stopped. The principle of good faith applies not only to the employer but the employee equally. Whether her actions to resign and now seek the investigation was to halt the employer's rights under the contract is very much an issue that will need investigation at the trial.

28. The grant of the injunction is most likely to deprive the employer in its defence to the employees claim arising out of the act of termination of the relationship by either party. It needs to establish that there was no constructive dismissal but lawful and fair termination of the employment. The burden is on the employer to discharge and the grant of the injunction on the facts of this case will be unfair.
29. Since reinstatement is not a remedy that the plaintiff seeks, I find that the scale tips in favour of the employer in not granting the relief sought. The interest of justice requires that the employer be allowed to complete the disciplinary process and not be tied down to accept the resignation of the plaintiff when it views it as not contractually effective. The plaintiff is concerned that the employer's sudden emergency to speed up the investigation and to complete the disciplinary process is to malign her. I see this a little differently. I find that due to the turn of events, given the purported resignation and her view that the investigation is no longer relevant and has become redundant, has caused the employer to recognize its rights under the contract and act expeditiously. I do not consider that the employer's actions in speeding up the process points towards any unfairness to her adding weight to the plaintiff's claim for injunction.
30. Since the plaintiff is claiming damages as a result of the contract coming to an end, the claim will not be futile if an injunction prayed for in the terms were to be refused.

Orders

31. I do not find any basis upon which the application for preliminary injunction is justified. I therefore:

- (a) *Dismiss the application for preliminary injunctive relief; and*
- (b) *Order the plaintiff to bear her own costs of the interim proceedings.*



A handwritten signature in blue ink, appearing to read "Anjala Wati", is written over a dotted line.

Hon. Madam Justice Anjala Wati

Judge

1. 07.2020

To:

1. *Singh & Singh Lawyers for the Applicant/Plaintiff.*
2. *File: ERCC 18 of 2020.*