IN THE EMPLOYMENT RELATIONS COURT

AT LAUTOKA

ORIGINAL JURISDICTION

CASE NUMBER: **ERCC 02 of 2017**

BETWEEN: **AJENDRA SHARMA**

PLAINTIFF/RESPONDENT

AND: **AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED**

DEFENDANT/APPLICANT

Appearances: *Mr. E. Maopa for the Plaintiff/Respondent.*

Mr. J. Apted for the Defendant/Applicant.

Date/Place of Judgment: *Friday 14 August 2020 at Suva.*

Coram: *Hon. Madam Justice Anjala Wati.*

RULING

A. Catchwords:

EMPLOYMENT LAW – ***STRIKING OUT*** – *employer designated as an "essential service and industry" - whether the ERC has jurisdiction to hear the employment grievance in relation to a worker and employer in an essential service and industry - whether the grievance was filed within the prescribed time of 21 days from the date when the grievance first arose - does the plaintiff's action of previously reporting his grievance to the ERT preclude him from filing an employment grievance in the ERC - does the ERC have jurisdiction over unlawful/unjustified and unfair dismissal claims or should claims for unlawful/unjustified and unfair dismissal be first reported to the Mediation Services and when the matter is not settled in the Mediation Services the same can be only referred to and dealt with by the ERT.*

B. Legislation:

1. *The Employment Relations Act 2007 ("ERA"): ss. 4, 110, 188, 200, 211, 220, and 230.*

Cause

1. The defendant has filed an application to strike out the plaintiff's claim. There are principally 4 grounds raised is support of the application. The first is that the Employment Court does not have jurisdiction to hear employment grievances in relation to a worker and an employer in an essential service and industry. The second is that it does not have jurisdiction to hear unlawful and unfair dismissal claims. The third and the fourth grounds are that the claim filed in the Employment Court is barred for two reasons. The first is that the employment grievance ought to have been filed within 21 days from the date when the grievance first arose and the second is that since the plaintiff had once chosen the Employment Tribunal as the forum to bring the claim, he cannot file another claim in the Employment Court.

2. The plaintiff's claim is against his employer for unlawful and unfair dismissal. He was summarily dismissed on 24 February 2017. The basis of the dismissal was that on 13 December 2016, the plaintiff as an employee of the bank, deliberately placed FJD 1,000 cash under the pages of his desk pad and then falsely recorded that there was shortage of FJD 1,000 from a deposit made by a customer named Vuvale Restaurant (Fiji) Limited.

3. The plaintiff was suspended from work on 30 December 2016 pending the investigation by the Bank. A disciplinary hearing was conducted on 23 February 2017 and the plaintiff was found guilty of the allegation. The dismissal followed the findings.

4. After the dismissal, the plaintiff reported an employment grievance over his dismissal to the Mediation Services on 3 March 2017. The parties attended the mediation on 22 and 30 March 2017. When the matter was not resolved, the Mediation Services referred the same to the Employment Tribunal. The matter was first called in the Tribunal on 26 May 2017.

5. The matter was in the Tribunal for almost 7 months where directions were given in the proceedings for the progress of the same. The plaintiff subsequently filed a notice of discontinuance of the proceedings on 17 November 2017. After that the plaintiff filed a claim in the Employment Court on 5 December 2017. It is on this claim in the Employment Court that the defendant has filed an application for striking out.

Issues

6. The issues arising in the application for striking out are as follows:

1. *Does the Employment Court have jurisdiction to hear an employment grievance involving a worker and an employer in an essential service and industry?*

2. *Whether the employment grievance was filed within the prescribed time of 21 days from the date when the grievance first arose?*

3. *Is it procedurally proper for the plaintiff to withdraw his employment grievance from the Employment Tribunal and file a fresh employment grievance in the Employment Court?*

   The issue can be put in another way:

   Does the plaintiff's action of previously reporting his grievance to the Employment Tribunal preclude him from filing an employment grievance in the Employment Court?

4. *Does the Employment Court have jurisdiction to hear unlawful/unjustified and unfair dismissal claims or should claims for unlawful/unjustified and unfair dismissal be first reported to the Mediation Services and when the matter is not resolved in the Mediation Services, the same should only be referred to and dealt with by the ERT?*

Analysis

7. The defendant is certainly nominated as an essential service and industry. As a result the first issue that needs to be resolved is whether the Employment Court has jurisdiction to hear an employment grievance in relation to a worker and an employer in an essential service and industry or is it the Employment Tribunal which has the exclusive jurisdiction to hear the same?

A. Jurisdiction of Employment Court

Re: Employment Grievances involving Essential Services and Industries

8. Mr. Apted reflected that since the defendant is classified as an essential service and industry, any grievance by an employee can only be first lodged in the Mediation Services and if the matter is not resolved then the Mediation Services will refer the same to the Employment Tribunal for hearing of the same. He argues that it is only the Employment Tribunal that has exclusive jurisdiction to hear an employment grievance when it concerns an essential service and industry.

9. Mr. Apted's position is based on s. 188(4) of the ERA which requires that an employment grievance shall be dealt with in accordance with Parts 13 and 20 of the ERA. Parts 13 and 20, according to Mr. Apted, does not provide for employment grievances to be heard by the Employment Court. Mr. Apted says that under Part 13, an employment grievance must be first reported to the Mediation Services which will refer the matter to the Employment Tribunal if the same is not resolved. He argues that Part 13 or any other provision of the ERA makes no provision for the matter to be heard by the Employment Court.

10. Mr. Apted says that although s. 220 of the ERA *(which falls under Part 20)*, permits the Employment Court to hear actions founded on an employment contract, it does not apply to an employer who is classified as an essential service and industry.

11. It is further argued that if the court finds that s. 220 does apply to an essential service and industry then the matter before the ERC is not founded on an employment contract because the statement of claim makes no reference to any contract which it is required to do if the action is founded on a contract.

12. Before I deal with the issues raised by the defendant, I must outline the provisions of s. 188 of the ERA. It states:

> *"188 (1) All trade disputes in essential services and industries shall be dealt with by the Arbitration Court in accordance with this Part.*

(2) The Employment Tribunal and the Employment Court established under Part 20 shall not have any jurisdiction with respect to trade disputes in essential services and industries.

(3) For the avoidance of doubt, Part 20 shall not apply to essential services and industries except as provided under subsection (4).

(4) Any employment grievance between a worker and an employer in essential services and industry that is not a trade dispute 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 –

(a) Where such an employment grievance is lodged or filed by a 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."

13. It is not in dispute that the plaintiff's claim is an employment grievance and not a trade dispute. There is an explicit provision in s. 188 (2) that precludes the Employment Tribunal and the Employment Court from hearing trade disputes involving an essential service and industry. On the contrary there is no explicit provision which excludes the Employment Tribunal or the Employment Court from hearing employment grievances involving a worker and an employer in an essential service and industry.

14. It is my view and finding that if the Employment Court was not to have jurisdiction in employment grievances involving an essential industry and service, there would be a similar

explicit exclusion in the ERA. In absence of any explicit provision, I am not prepared to bar the workers from having access to the Employment Court. Any such interpretation precluding them their right to file claims in the Employment Court will amount to denial of their rights to have their claims beyond $40,000 being litigated as it is obvious from s. 211(2)(a) that the Employment Tribunal can only adjudicate matters relating to claims up to $40,000.

15. S. 188(4) states that any employment grievance between a worker and an employer in an essential service and industry that is not a trade dispute shall be dealt with in accordance with Parts 13 and 20. Part 20 of the ERA establishes both the Employment Tribunal and the Employment Court so how can the Employment Court be excluded from having jurisdiction in this matter?

16. I also do not accept Mr. Apted's argument that since mediation of employment grievance is compulsory under Part 13 of the ERA, the matter will have to be heard by the Employment Tribunal if it is not resolved in the Mediation Services. He says that there is no scheme to refer the matter to be heard by the Employment Court.

17. I 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.

18. S. 188(4) says that the employment grievance must be dealt with accordance in 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.

19. Upon reading both the sections on mediation, it can be safely concluded that if a person wishes to access the Employment Court, s. 200(1) (a) can apply and there will not be a need to go

through the Mediation Services first. This is because if a person accesses Mediation Services first and the matter is not resolved, the claim will be referred to the Tribunal.

20. I therefore do not feel that mediation is a prerequisite for adjudication of matters in the Employment Court. There is no provision close to requiring this although it is desirable that parties consider settling employment grievances before coming to court. I therefore do not endorse Mr. Apted's submissions that the scheme of the Act does not allow for employment grievances to be heard by the Employment Court.

21. Further, s. 220 (1) (h) and (i) of the ERA which falls under part 20 of the ERA allows the Employment Court to hear matters founded on an employment contract and to make any order that the Tribunal may make under any written law or the law relating to contracts.

22. The term grievance as defined by s. 4 of the ERA includes dismissal of all forms. The plaintiff in this case has brought an action for unlawful and unfair dismissal. His dismissal has arisen out of his employment. It is understood that the employment was pursuant to some arrangement between the parties which is the contract between the parties. Even if the plaintiff has not pleaded the specific contract, his claim is very much about the contract against which he was unlawfully and unfairly dismissed. It is not at all difficult to gauge the nature of the claim. The plaintiff's claim is definitely based on his contract and as a result he falls under s. 220 (1) (h) of the ERA.

23. I have not found any provision in the ERA which excludes application of s. 220 to an employer in an essential service and industry. As such I find Mr. Apted's argument devoid of any merit.

B. Time Period for Filing

C. Filing in Employment Court Barred?

24. Mr. Apted submitted that the claim filed in the Employment Court is filed out of time in that it was not filed within 21 days from the date when the grievance first arose as required by s. 188(4) of the ERA.

25. He also contends that the plaintiff cannot file a claim in the Employment Court once he has chosen the Employment Tribunal as the forum to file his case. The argument is based on s. 188 (4) (a) and (b) of the ERA.

26. It is not disputed that after the dismissal the plaintiff went ahead and lodged a grievance in the Mediation Services. He did that on 3 March 2017 which was within the 21 day rule required by s. 188(4) of the ERA. The same section provides that all grievances shall be dealt with in accordance with Parts 13 and 20.

27. Part 13 of the ERA requires that all employment grievances must be first referred for mediation services as set out in Division 1 Part 20: ***s. 110(3)***. The plaintiff did what the law required of him to do. It is my view that those who wish to file their employment grievance in the Employment Court need not first file their grievance in the Mediation Services. However, the different provisions of the law impose different directions. One provision makes mediation compulsory and one another provision makes it discretionary. If due to this confusion, a litigant lodges his claim first in the Mediation Services within 21 days, he should not be found foul of the rule of not having filed his claim in the Employment Court within 21 days. It is the uncertainty in the law that causes them this difficulty and the benefit of this must be given to the litigants.

28. In the present case, I find that the 21 day rule had been complied with. I come now to the next argument that once the Mediation Services had referred the matter to the Tribunal and the plaintiff was in that forum for almost 7 months, he could not withdraw his claim and file a second claim in the Employment Court.

29. I have read the provisions of s. 188(4) (a) and (b) very carefully and I find that the effect of s. 188(4) (a) is that if a worker has filed a grievance involving an essential service and industry under the ERA then that worker is barred from filing a claim to vindicate his or her rights under any other law for example filing a constitutional redress application, a claim for dismissal in the High Court under the common law jurisdiction, an application for judicial review and so forth. S. 188(4) (b) has a vice versa effect. This means that the worker can choose to either

vindicate his grievance under the ERA or under some other law. Any person making a claim under the ERA has no rights to vindicate his claim under any other law.

30. I must admit that my first reading of the above sections meant that it avoided duplicity of claims and also second claims under the ERA but having heard the arguments of both counsel, my initial findings are not applicable in this matter. It is proper to avoid duplicity of claims as two claims for infringement of one particular right may amount to an abuse of the process of the court. However I do not see any prejudice if like in this case, the employee has withdrawn his case because he realized that his claim was beyond the jurisdiction of the Tribunal and then files a fresh claim in the Employment Court.

31. His claim is yet to be decided and needs to be tried. He has the right to choose a forum that best suits his claim. In absence of a proper reason, he cannot be deprived of a right to have his claim tried in the Employment Court.

D. Employment Court's jurisdiction to hear unlawful and unfair dismissal claims.

32. The issue that I need to resolve is whether the ERC has jurisdiction to hear claims for unlawful/unjustified dismissals and unfair dismissals.

33. I must say that after the enactment of the ERA, the workers now have a statutory right to bring claims for unjustified and unfair dismissals. Previously their right was confined to wrongful dismissal claims under the common law.

34. An employment grievance includes dismissal of a worker. The term dismissal covers any form of dismissal whether it is unjustified or unfair. If a worker pleads that he or she is unjustifiably or unfairly dismissed, it is understood that the dismissal is in reference to the employment. If the worker has not pleaded the employment contract that does not mean that his claim can be struck out. He is understood to be making reference to his contract which has been put to an end by the employer. He is not bringing a claim under a leasing contract which needs specific reference to in the pleading. In an employment case, a claim for unjustified and unfair dismissal

is largely based on an employment contract. In this case specifically it is not difficult to gauge that the claim is founded on the employment contract though not pleaded.

35. S. 220 allows the ERC to hear actions founded on an employment contract. In this case too, the claim involves the plaintiff's contract and bringing to an end of the same. What the pleadings basically state is that the employer has unjustifiably and unfairly brought the contract to an end. I do not find that it is difficult to find the cause of action from the manner in which the pleadings have been presented.

36. The Employment Tribunal only has jurisdiction to hear claims up to $40,000. Let us take an example of a person in an employment being paid a salary of about $250,000 per annum. If he is out of employment for 2 years and is claiming loss of salary for 6 months, his claim for unjustified and unfair dismissal, on the face of it, will not be within the jurisdiction of the Employment Tribunal.

37. S. 230 (b) of the ERA is a provision on the remedies that can be granted in settling employment grievances. This is a statutory provision on remedies. This provision allows recovery of whole or part of the wages lost as a result of the grievance. If the employee described in my preceding paragraph wants to claim lost wages for 6 months, his claim definitely will be beyond the jurisdiction of the Tribunal. In such a case he will have to make a claim in the Employment Court. Why should he forced to accept anything up to $40,000 when the legislature has not fixed a maximum ceiling for the claims for employment grievances?

38. Mr. Apted says that under common law, the remedy would usually be limited to the notice period and so the remedy of $40,000 is the maximum that a litigant can claim in an employment grievance matter. His argument is made in ignorance of the statutory right to claim all wages lost and also the right to claim for loss of property, and to be paid compensation for humiliation, loss of dignity and injury to feelings.

39. There would be so many cases which will be seeking remedy for lost wages beyond $40,000. I do not find that it is legally permissible to go past the provisions of s. 230 and set a ceiling

for damages in all employment grievance cases. This would result in absurdity and the provisions of s. 230 unworkable.

40. Further, if Mr. Apted's argument were to be given any weight, the effect it will have on access to justice principle will be compromised. Aggrieved parties will be forced to confine their cases to a particular forum. It is my view that in absence of any particular explicit provision excluding the jurisdiction of the Employment Court from hearing employment grievances, it is improper to oust the jurisdiction of the Employment Court.

41. I also refer to s. 230 (1) and s. 230(2) of the ERA. Both the provisions have the following words:

"If the Tribunal or the Court determines that a worker has an employment grievance,..."

42. The above words in itself indicates that the Court can determine an employment grievance. I reiterate that the definition of grievance include dismissals. I therefore cannot agree with Mr. Apted that the scheme of the Act does not allow for employment grievances to be heard by the Employment Court.

43. I must say that since the enactment of the ERA and post year 2009, there have been so many unlawful and unfair dismissal cases filed in the Employment Court and dealt with. Before the enactment of the Act, litigants mostly filed their claims in the High Court under the common law principles. They still do but most of the cases are now in the Employment Court where the statute provides a right to claim for unlawful and unfair dismissal. To suddenly stop all the claims from being determined will affect public interest which is not supported by the scheme of the ERA.

44. I do not accept Mr. Apted's argument that the law in New Zealand that the Tribunal has exclusive jurisdiction in all employment grievances must be applied in Fiji. Mr. Apted has not been able to show to me that the law in Fiji has set a maximum ceiling of $40,000 in damages for unlawful and unfair dismissal cases to allow the Employment Tribunal in Fiji to hear all employment grievances. In that regard, ousting the jurisdiction of the Court will amount to

putting a ceiling on their claims when the legislature has not set any. This will go against the spirit and the mandate of the ERA.

45. I therefore do not find that the Employment Tribunal has the exclusive jurisdiction to hear all employment cases. It has jurisdiction to hear employment cases for claims up to only $40,000. Beyond that, the claims must be filed in the Employment Court.

Orders

46. For reasons enunciated above, I dismiss the application for striking out of the claim.

47. I order costs against the defendant in the sum of $2,000 to be paid within 14 days.

48. The parties are now granted 14 days to file their affidavits verifying list of documents. Thereafter 14 days is granted to them for discovery and inspection of the documents. After the expiry of the period for discovery and inspection, the parties must convene a pre-trial conference and file minutes of the same within 14 days.

49. The matter will be listed before a Judge sitting in the Employment Court in Lautoka to monitor the compliance of the directions and to fix a hearing date when the matter is ready. The Deputy Registrar, Lautoka High Court shall inform the parties of the next available date before a Judge.

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Hon. Madam Justice Anjala Wati

Judge

14. 08. 2020

HIGH COURT OF FIJI SUVA

To:

1. ***Babu Singh Associates for the Plaintiff/Respondent.***
2. ***Munro Leys Solicitors for the Defendant/Applicant.***
3. ***File: ERCC 02 of 2017.***