

IN THE EMPLOYMENT RELATIONS COURT OF FIJI
AT LAUTOKA (WESTERN DIVISION)
EMPLOYMENT JURISDICTION

ERCC No. 04 of 2019

BETWEEN : ELIKI KAUMAITOTOYA

PLAINTIFF

AND : AIR TERMINAL SERVICES FIJI LIMITED

DEFENDANT

BEFORE : M. Javed Mansoor, J

COUNSEL : Mr. K. Tunidau for the plaintiff

: Ms. M. Rakai for the defendant

Date of Hearing : 11 November 2020

Date of Judgment : 30 June 2022

DECISION

EMPLOYMENT LAW

Summons to strike out – Unfair dismissal – Wrongful dismissal – Unfair treatment and humiliation – Damages – Limitation – Order 18 Rule 18 High Court Rules 1988 – Section 4 Limitation Act 1971

The following cases are referred to in this decision.

a) Lindon v Commonwealth of Australia (No.2) 136 ALR 251

1. The plaintiff filed this action claiming damages from the defendant for unfair dismissal, wrongful dismissal and unfair treatment and humiliation. He sought damages in a sum of \$25,584.50 for unfair dismissal, \$319,579.68 as damages for wrongful dismissal and general damages in a sum of \$50,000.00 for unfair treatment and humiliation, and aggravated and/or exemplary damages and special damages for the defendant's alleged acts of victimization and humiliation. He claimed a sum of \$25,500.00 for the alleged loss of FNPF benefits.
2. The defendant filed a summons to strike out on 3 October 2019 stating that the plaintiff's claim is statute barred, and that the action is scandalous, frivolous or vexatious or that it was an abuse of the process of court. The application to strike out was made under Order 18 rule 18 (1) (b) and (d) of the High Court Rules 1988 and the inherent power of court. The defendant moved that the statement of defence be stayed until 7 days after the hearing and determination of the application to strike out the action. On behalf of the defendant, its Manager Human Resources, Mr. Richard Donaldson, gave an affidavit in support of the defendant's summons to strike out the action.
3. Mr. Donaldson averred that the plaintiff's employment was terminated in January 2010 and that his claims were time barred as the plaintiff's grievance concerning his dismissal was referred to the Employment Relations Tribunal (tribunal) more than 9 years before the filing of this action on 10 July 2019. He averred that the plaintiff had failed to turn up for the hearing before the tribunal on 19 March 2014 and that, upon the proceedings being struck off on 13 May 2016, costs were ordered by the tribunal. The plaintiff had failed to comply with the costs orders

made by the tribunal on 13 May 2016. Mr. Donaldson also averred that the plaintiff's case was struck out by the tribunal on 13 November 2017 for want of prosecution.

4. Two sealed orders were annexed to Mr. Donaldson's affidavit. The court considers the contents of these orders to be material. The order sealed by the tribunal on 18 May 2016 refers to orders made on 13 May 2016. The plaintiff and two others were named respondents in the order. The order says that the entire proceedings in employment grievances Nos. 121, 122 and 123 of 2010 are struck out for non-appearance on 13 May 2016 by the respondents and their counsel, for non-appearance by the respondents on 19 March 2014 for their interlocutory hearing, and for non-prosecution of their grievances since 19 March 2014 to 6 January 2016. The tribunal ordered those respondents to pay wasted costs of \$1,000.00. Costs were awarded as the respondents in that case and their counsel were given time on more than two occasions since 15 January 2016 to file their affidavit in opposition, and as the respondents and their counsel were aware of the hearing date and were given a further opportunity to file a response to the striking out application and the order for costs for 19 March 2014 was adjourned for the appearance of the three respondents. The tribunal stated that the respondents had no right to reinstatement unless costs are paid within 30 days of the order made on 13 May 2016.
5. A second order sealed by the tribunal on 29 November 2017 refers to orders issued on 13 November 2017. The tribunal ordered the three matters be discontinued. There was no order as to costs. How this second order came about is not explained by either party. Both orders refer to case numbers 121, 122 & 123 of 2010.
6. On 17 March 2020 and 1 July 2020, Mr. Tunidau sought time to file an affidavit in opposition on behalf of the plaintiff. However, on 11 November 2020, Mr. Tunidau informed court that the plaintiff did not intend to file an affidavit in opposition, saying that he would rely on his submissions. At the hearing, after clarifying certain matters to court, counsel for both parties said they would rely on their written submissions.

7. To secure the relief that has been sought, the party seeking it must show that it is clear, on the face of the opponent's documents, that the opponent lacks a reasonable cause of action or is advancing a claim that is clearly vexatious¹. It is necessary, therefore, to examine the plaintiff's statement of claim.

8. In his statement of claim, the plaintiff provided a helpful summary of the case before the tribunal. The parties attended mediation services at the ministry of labour & industrial relations on 26 April and 25 May 2010. The matter was referred to the tribunal on 27 May 2010. Between 2010 and 2012, the case was called before the tribunal. The plaintiff filed an application seeking a transfer to the court on 9 April 2013. The hearing into the transfer application was fixed for 19 March 2014. The plaintiff and his counsel did not attend the hearing on 19 March 2014. Between 19 March 2014 and 6 January 2016, the plaintiff did not prosecute the case. An interlocutory hearing was fixed for 13 May 2016 on the defendant's application. The plaintiff did not attend the hearing on 13 May 2016. On that day, the plaintiff's case was dismissed due to non-appearance. No further details of the orders made by the tribunal are mentioned. The plaintiff filed an application in the tribunal to set aside the order made on 13 May 2016. Hearing into the application was fixed for 16 June 2016. What happened on this day is not stated by the plaintiff. The hearing is not likely to have taken place on the day fixed for hearing. The case was mentioned on 24 September 2017. The plaintiff says he discontinued the case on 13 November 2017; this position is inconsistent with what is stated in the tribunal's sealed order dated 29 November 2017. This action was filed on 10 July 2019.

9. What is clear from the plaintiff's summary and the tribunal's orders is that the plaintiff was very lax in prosecuting his case. There was no explanation why he did not prosecute his case between 19 March 2014 and 6 January 2016. In his statement of claim the plaintiff says that an application was made to transfer proceedings to the court. There is no indication that an application was made to the tribunal to transfer proceedings from the tribunal to the court under section 218 of the Act. Though this is not substantiated by evidence, I will accept it as the defendant has not denied this claim. He does not say why he did not follow up

¹ Lindon v Commonwealth of Australia (No.2) 136 ALR 251 at 256.

with his application to transfer proceedings from the tribunal to the court, having made the application on 9 April 2013. He did not attend the inquiry or pursue the matter thereafter. The plaintiff made no attempt to canvass the adverse orders made against him by the tribunal. He did not comply with the tribunal's unless-order made on 13 May 2016 for costs to be paid for reinstating the matter. Though he disputed that such an order was made, and claimed that he discontinued his case, the plaintiff did not provide any evidence to back his claim. Without an explanation by the plaintiff of the contents of the order sealed on 18 May 2016, his attempt to say the tribunal did not strike off his case cannot be taken seriously. This could have been explained by way of an affidavit by the plaintiff, which his counsel agreed to file on two occasions, but did not do so. Evidence is not admissible under Order 18 rule 1(a), if the strike out application is on the ground that a pleading does not disclose a reasonable cause of action. In this case, the defendant's application to strike out is under O 18 r 1 (b) & (d) i.e: where a pleading is said to be scandalous, frivolous or vexatious, or is otherwise an abuse of the process of court.

10. The plaintiff's claims are premised on unfair dismissal as well as on wrongful dismissal.
11. The first cause of action is for unfair dismissal on the grounds that the plaintiff was not provided with formal allegations in writing and that he did not have the opportunity to defend himself. The plaintiff sought to recover his entitlement of gratuity for 37 years of service, basic salary adjustment for three years and allowances relating to housing, entertainment, telephone and car. The amount due to the plaintiff after setting off payments received is stated as \$25,584.50.
12. Section 211 (1) (a) of the Act states that the tribunal has jurisdiction to adjudicate on employment grievances. Section 211 (1) (d) of the Act states that the tribunal has jurisdiction to adjudicate on all actions under the Promulgation for the recovery of wages and other money. The plaintiff's claims to recover these sums must, therefore, be made to the tribunal. The employee chose the proper forum at the outset, but his case was dismissed with costs for non-prosecution. The plaintiff cannot succeed on this ground. The claim for unfair dismissal must fail as section

211 (1) (a) of the Act confers jurisdiction on the tribunal to hear employment grievances and on section 211 (1) (d) to recover wages and other dues.

13. The second cause of action was for wrongful dismissal. The plaintiff alleged that the termination letter of 20 January 2010 gave no specific reason as to why the plaintiff's employment was terminated. He pleaded that the defendant did not justify the termination of his employment. He sought damages for unpaid annual leave, unpaid wages and loss of salary over a three year period from 19 October 2009 to 18 October 2012. The total sum due under this head is shown as \$319,579.68. In addition, he claimed a sum of \$25,500.00 for loss of FNPB benefits, possibly those arising from the alleged breach of contract. It appears that this cause of action is grounded on breach of contract, although the plaintiff does not make it clear which terms of the contract are in breach.
14. The plaintiff submitted that the Employment Relations Act (Act) does not impose strict procedural requirements as in civil cases. He submitted that the Act permitted much flexibility in regard to employment cases. An employee, Mr. Tunidau submitted, does not have to file an employment grievance within a stipulated time. He agreed to tender authorities in support of his argument that the delayed filing of an action in court was possible under flexible provisions of the Act. However, the court was not furnished with supporting authorities.
15. Ms. Rakai, on behalf of the defendant, submitted that in terms of section 4 of the Limitation Act 1971, the plaintiff's claim should have been filed in court within six years of the termination of his employment. He had failed to file his claim within the give time, she submitted. The plaintiff submitted that the action is not statute barred as proceedings were initially instituted in the tribunal. Those proceedings were discontinued, he submitted, as the tribunal did not have the monetary jurisdiction to award the value of damages claimed by the plaintiff. His case, he said, was discontinued and not struck out as the defendant had claimed. After proceedings were discontinued, the plaintiff submitted, the action was filed in the Employment Relations Court (court) in 2019.
16. I accept the defendant's submission that his claims are barred by section 4 of the Limitation Act. An action founded on a breach of contract must be brought within

6 years of the breach. An action for damages for negligence or breach of duty must be brought within three years of the accrual of the cause of action. These statutory periods cannot be extended in respect of the claims made by the plaintiff. The termination of the plaintiff's employment occurred in 2010. This action was instituted in 2019. The plaintiff's claims based on contract are clearly prescribed.

17. The third cause of action is based on unfair treatment and humiliation of the plaintiff. How this is different from the first cause of action is not clear. The termination of his services, the plaintiff pleaded, was telecast live by television and given newspaper coverage. He sought general damages in a sum of \$50,000.00, and aggravated and/ or exemplary damages and special damages. If the complaint is grounded on unfair dismissal, the tribunal is the proper forum to adjudicate the matter, and the plaintiff's claim must fail. Aggravated and/ or exemplary damages does not arise.
18. The case, having been instituted in 2010, continued in the tribunal until 2017. The defendant submitted that it had to incur expenses over this period to defend proceedings instituted by the plaintiff. The defendant submitted that the plaintiff was abusing the process of court by this action. There is no evidence that costs ordered by the tribunal were paid on behalf of the plaintiff or that an application was made for reinstatement of the plaintiff's case before the tribunal.
19. Kirby J in the High Court of Australia decision in *Lindon v The Commonwealth of Australia (No2)*². stated that if it is clear that proceedings within the concept of the pleadings under scrutiny are doomed to fail, the court should dismiss the action to protect the defendant from being further troubled, to save the plaintiff from further costs and disappointment and to relieve the court of the burden of further wasted time which could be devoted to the determination of claims which have legal merit³.
20. Striking out an action is an extreme measure as it denies a litigant access court. The material placed before court, however, satisfies me that these proceedings are vexatious and an abuse of the process of court. Courts find such actions to be a

² 136 ALR 251

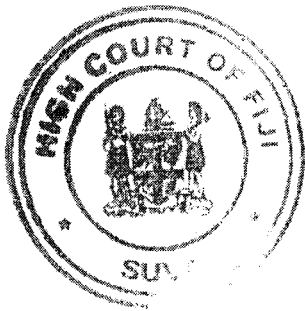
³ Page 256

matter of concern. The court's time must be spent on matters more deserving. In these circumstances, an order for costs would be appropriate.

ORDER

- A. The defendant's summons to strike out filed on 3 October 2019 is granted.
- B. The plaintiff is directed to pay the defendant costs in a sum of \$1,000.00 within 28 days of this decision.

Delivered at Suva this 30th day of June, 2022



M. Javed Mansoor
M. Javed Mansoor
Judge