IN THE HIGH COURT OF FIJI
AT LABASA
CIVIL JURISDICTION

HBC 11 OF 2019

BETWEEN : **NAVNEET VISHAL PRASAD**

PLAINTIFF

AND : **MATE WAQAISAVOU AND MELI BULITAVU**

FIRST DEFENDANTS

AND : **MINISTRY OF EMPLOYMENT, PRODUCTIVITY & INDUSTRIAL RELATIONS**

SECOND DEFENDANT

AND : **ATTORNEY GENERAL OF FIJI**

THIRD DEFENDANT

COUNSEL : Mr. A. Kohli for the Plaintiff
Ms. M. Motofaga for the Defendants

Date of Hearing : 16 May 2022

Date of Judgment : 6 September 2023

JUDGMENT

NEGLIGENCE Injury at work place – Agreement with employer on behalf of workman under section 16 of the Workmen's Compensation Act – Refusal of workman to agree compensation with employer – Bar to common law action against employer – Sections 16 & 25 of the Workmen's Compensation Act 1964

The following cases are referred to in this judgment:

a. *Prasad v Lincoln Refrigeration Ltd [2017] FJHC 185; HBC10.2015 (24 February 2017)*

b. *Lincoln Refrigeration Ltd v Prasad [2018] FJCA 159; ABU24.2017 (5 October 2018)*

---

1. The plaintiff suffered injuries while working as an electrician for Lincoln Refrigeration Limited ("employer"). Following a complaint to the second defendant, the employer remitted a sum of $9,100.00 to the labour office to be paid as the assessed sum of compensation to the plaintiff. The labour office initiated an agreement with the employer under section 16 of the Workmen's Compensation Act 1964 ("Act"), although the plaintiff did not sign the agreement. The plaintiff refused to accept the payment made by the employer and to be bound by the agreement.

2. The first defendants were the labour officers of the second defendant and, at different stages, initiated and processed the payment of compensation to the plaintiff. The cause of action against the second defendant is on the basis that the Ministry of Employment, Productivity & Industrial Relations ("ministry") is vicariously liable for the acts of it servants and agents. The third defendant has been made a party as the government's legal representative.

3. In his statement of claim, the plaintiff alleged that the first defendants were negligent in carrying out their duties as the servants and agents of the second and third defendants, and listed out their acts of negligence. These related to *inter alia* the failure of the first defendants to investigate the risks to which the employer had exposed the plaintiff, and the failure to take necessary steps before accepting $9,100.00 as compensation on behalf of the plaintiff, notwithstanding his refusal to agree to the sum.

4. The plaintiff's case is that by agreeing on his behalf and accepting a sum of $9,100.00, the first defendants deprived the plaintiff's rights to institute civil

action against the employer for negligence. He is suing the defendants to recover special and general damages for the losses caused to him.

5. The defendants denied the plaintiffs claim and stated that the labour officers had performed their duties under the Act to compensate the plaintiff. They pleaded that the maximum compensation payable under the Act was $9,100, and that the sum was calculated according to the gross weekly earnings and having considered the 25% disability shown by the medical report (final disability assessment) dated 7 October 2019. The defendants pleaded that the plaintiff pursued compensation under the Act until the claim was withdrawn on 4 May 2015, by which time the payment was ready for collection. As the payment was not collected, it was reimbursed to the employer's insurance company on 30 June 2015. The defendants also pleaded that issues concerning the employer's duties to provide a safe working environment and the injuries sustained by the plaintiff were pleaded in HBC No.10 of 2015 and in the related appeal of ABU 24 of 2019, and, therefore, these issues were *res judicata*. The plaintiff replied the amended statement of defence filed by the defendants.

6. A number of issues have been placed before court. The main questions however, are whether the first defendants were at fault in initiating a section 16 agreement under the Act and accepting the sum of $9,100.00 from the employer given the nature of the accident, the resultant injuries and the plaintiff's refusal to consent to the sum, and if so, whether the second defendant is vicariously liable for the negligence of the first defendants. Questions concerning whether a safe working environment was provided and the pain he underwent were also raised.

7. Before the matter was taken up for trial, the defendants filed an application to strike out the plaintiff's action on the ground that there is no reasonable cause of action. The application was struck out by the master's ruling of 19 July 2021.

8. At the commencement of trial, counsel for the plaintiff, Mr. Kohli submitted that when the plaintiff filed action to recover damages from the employer, the employer moved to strike out the matter[1]. Although the application was dismissed at first instance, the Court of Appeal upheld the objection saying that the labour officers had agreed on behalf of the plaintiff to accept

[1] Prasad v Lincoln Refrigeration Ltd [2017] FJHC 185; HBC10.2015 (24 February 2017)

compensation from the employer[2]. The Court of Appeal noted that the plaintiff was at liberty to pursue an action against the labour officer, if he so desired.

9. The plaintiff, Navneet Vishal Prasad, gave evidence on his behalf. He said that he was an electrician, having completed training in 2006. He commenced employment with the employer in July 2012. On 25 March 2013, he was asked by his employer to repair the air conditioner at Oriental Restaurant. Two workmen were assigned the job and both were at the site. The witness recalled that it was raining at the time. The other employee, Vinay, went first and the plaintiff followed. The air conditioner was located on the roof of the supermarket, which adjoined the restaurant, and a ladder was placed on the roof to gain access to it. Before reaching the ladder, the plaintiff slipped, and fell with the ladder to an adjoining roof at a lower level.

10. The plaintiff was unconscious for a short while, and was taken to hospital, and discharged a week later. He was at home for six months as he could not work. He received two thirds of the salary from 8 March 2013 to 24 July 2013 when he stayed at home. When those payments stopped, he said he obtained payment through the second named first defendant until September 2013. He said that he instructed the second named first defendant to obtain compensation for him.

11. The plaintiff told court that his lawyers advised him to claim compensation from his employer. The ministry did not counsel him in this regard. Instead, he was asked to collect a cheque for the sum of $9,100.00 from the second floor of the ministry building. He said that an officer came to the ground floor and asked him to sign and accept the cheque for $9,100.00 as he was unable to climb the stairs. He did not accept the cheque. He said in cross examination that he did not accept the cheque as the labour officer had not mentioned the amount previously.

12. The plaintiff said he went to India for treatment in 2016, after which his condition improved and he resumed work. He said his mother and wife accompanied him to India. He produced the electronic airline ticket and medical report from the doctor who attended to him in India. Ms. Motofaga did not object to the medical report from India but asked court to give it

[2] Lincoln Refrigeration Ltd v Prasad [2018] FJCA 159; ABU24.2017 (5 October 2018)

appropriate weight. The plaintiff also produced medical reports prepared by the Labasa hospital.

13. The plaintiff said he is unable to work as an electrician. He takes an injection every fortnight and tablets for pain management whenever he is in pain. The plaintiff gave details of the way in which his normal life is affected. He was unable to engage in sport, walk for long, swim or drive his vehicle. He is in pain when getting in, sitting or getting out of the car. He mentioned several activities that have been curtailed as a result of the injuries.

14. The plaintiff said that being a licensed electrician he would have continued to work as an electrician if not for his injury. While in employment he earned $140.00 per week. He also played an instrument called *dholak* and earned about $50 a week. He said he did not take up an offer to work in New Caledonia because of his injuries.

15. Meli Bulitavu and Mate Waqaisavou gave evidence on behalf of the defendants. They are the first named defendants. Meli Bulitavu worked as an officer of the second defendant when the plaintiff gave notice of the accident to the ministry. The witness said that the accident took place on 25 March 2013, and the plaintiff reported the matter on 28 June 2013, about three months after his injury. Until then, the employer did not report the accident, although it is a statutory requirement to do so within 14 days. Upon receiving information of the accident, he arranged for the plaintiff to receive two thirds of his weekly pay of $140.00. He was aware that once an agreement is signed with the employer, the worker could not bring a common law action. The witness said he was not attached to the labour department when Dr. Biribo's medical report – which assessed the plaintiff's impairment at 25% - was received in 2014.

16. Mate Waqaisavou, the first named first defendant, said in her evidence that she took over from Meli Bulitavu in 2014 in the workmen's compensation unit. An assistant labour officer, the witness said she computed the plaintiff's compensation by considering his gross weekly earnings at the rate of 25 percent impairment based on the medical report. The witness said that the assessed compensation was the maximum that the plaintiff was entitled to under the Act. She said that when she informed the plaintiff that his compensation is $9,100.00, he did not say anything. She said she made the calculation on 18 November 2014, and on the next day informed the employer of the assessed sum.

17. After the employer made settlement in March 2015, she sent a memo to the permanent secretary in order to arrange payment to the plaintiff. She said the plaintiff did not want to sign and accept the cheque when it was given to him on 3 May 2015. He told her to hold on to the cheque saying he wanted to speak to his solicitor. The plaintiff withdrew his application for workmen's compensation on 4 May 2015.

18. The witness said that the labour office received a cheque for compensation from the insurance company on 10 March 2015, and she sent the cheque to the head office on 2 June 2015. As the plaintiff refused to accept the cheque, a payment voucher was prepared by the accounts division on 16 June 2015 and the cheque was returned to the insurance company on 30 June 2015.

19. By letter dated 27 June 2015, the plaintiff's solicitors wrote to the labour officer stating that the labour department did not act in the best interest of the plaintiff, and that they have instructions to sue the department for negligence if the claim against the employer is dismissed. Replying by letter dated 7 July 2015, Mate Waqaisavou stated that the payment had been ready for collection and that the plaintiff was fully explained the consequences of accepting the payment and signing the discharge.

Were the first defendants in breach of their duties?

20. The main issue before court is whether the first defendants were negligent in performing their duties. If the answer is in the affirmative, there arises the question of damages. The plaintiff asserted negligence on several grounds. Two other matters urged by the plaintiff will be considered before the issue of negligence is examined.

21. The plaintiff submitted that the first defendants were obliged to advice the plaintiff that he could file a common law action to claim damages for the employer's negligence, and that a claim under the Act should have been filed only if the plaintiff had declined to file a separate action. Mr. Bulitavu said in cross examination that there is no indication from the labour office file that the ministry advised the plaintiff to file a common law action.

22. The plaintiff did not refer the court to any statutory provision that imposed such an obligation on the labour officers. It is a matter for the injured workman to decide whether he wishes to pursue an action independent of the Act. Moreover, the plaintiff had the benefit of legal advice from his solicitors.

On the facts of this case, it cannot be inferred that the labour officers had a duty to advice the plaintiff to pursue a common law action for damages against the employer.

23. The plaintiff also submitted that the labour officer should have visited the scene of the accident and investigated whether it was safe for the worker to have been employed in the given assignment or whether the employer had complied with regulations concerning safety. Mr. Bulitavu said in cross examination that he did not visit the scene of the incident, and had not carried out accident site visits previously. The witness agreed that the employer had failed to report the accident within the prescribed period to the permanent secretary of the ministry. The plaintiff submitted that the defendants failed to take action regarding the employer's failure to adhere to provisions of the Act and the Health and Safety at Work (Administration) Regulations 1997, although provisions existed for the imposition of fines on employers who acted in breach of their duties.

24. The plaintiff alleged that the labour officers did not carry out a proper investigation, and, therefore, were in breach of their duties. For the purpose of assessing compensation, however, the first defendants relied on the medical report. The plaintiff does not say how shortcomings in their investigations affected the assessment of compensation under the Act or their claim for damages. The failure of the labour officers to take measures for the imposition of fines on the employer is a matter of concern. However, there is no material to show that the statutory breaches impacted the plaintiff's remedies.

25. The plaintiff's main contention is that the first and second defendants entered into an agreement under section 16 of the Act. The court will examine whether the labour officers were negligent in processing and obtaining approval under section 16 of the Act.

26. The plaintiff's statement to the ministry on 28 June 2013 requests help with a claim for workmen's compensation. However, by letter dated 3 December 2014, the plaintiff's solicitors advised the senior labour officer that they had reason to believe that the employer was negligent, and requested a copy of the investigation report. Mate Waqaisavou admitted receiving the letter, but did not reply. Subsequently, she said she received a telephone call from the plaintiff's solicitor and was told that the plaintiff would be pursuing a claim against the employer based on negligence. The witness said that the solicitors

had nevertheless asked her to continue with the workmen's compensation claim. There was no record of that call in her office file.

27. Ms. Waqaisavou agreed that compensation forms were signed by the ministry's permanent secretary although the workman did not agree to the compensation amount. The witness said that before the forms were put for the permanent secretary's signature, the plaintiff wanted her to withdraw the claim, but his law firm wanted her to go ahead with it. The plaintiff withdrew his application for compensation on 4 May 2015. She was aware that a common law action for damages could not be filed after the workman agrees to accept compensation under section 16 (1) of the Act. She said that the agreement was not signed by the workman as he did not agree to the compensation assessed under the Act. The agreement was signed by the acting permanent secretary on 25 March 2015. At a later point in her evidence, she said that the plaintiff disagreed with the amount of compensation after the permanent secretary had signed on his behalf. She said that the agreement was prepared after payment was received from the employer.

28. The parties to a section 16 agreement are the employer and the workman. Section 16 (1) of the Act provides for the employer and the workman to agree the sum of compensation, with the permanent secretary's approval. The agreed sum must not be less than the compensation payable under the Act. The agreement can be pronounced as an order of court.

29. In this case, the workman did not sign the agreement. The permanent secretary approved the agreement on 25 March 2015 without the plaintiff's signature. The plaintiff says that notwithstanding his refusal to sign the agreement and accept compensation under the Act, the defendants entered into a contract with the employer on his behalf, and that this prevented him from suing the employer for damages.

30. Ms. Waqaisavou explained that the permanent secretary gave approval before the plaintiff withdrew the application. However, the plaintiff's solicitor had indicated that an action for negligence would be filed against the employer. It is reasonable to suppose the labour officer had this knowledge prior to referring the section 16 agreement for the permanent secretary's approval and for endorsement of the payment. When the plaintiff refused to sign the agreement, the officer should have exercised caution in referring the agreement for the permanent secretary's approval. The labour officers and the

permanent secretary would have been aware of the legal effect of signing or approving an agreement under section 16 (1) of the Act.

31. Section 25 of the Act permits civil proceedings to be instituted independently of the Act to recover damages against the employer where injury is caused by the personal negligence or wilful act of the employer or a person acting on behalf of the employer. A judgment in such an action will be a bar to proceedings under the Act in respect of the same injury. Similarly, a judgment given under the Act will be a bar to civil proceedings for the recovery of damages independent of the Act. An agreement between the workman and the employer for the payment of compensation under section 16 (1) of the Act will be a bar to proceedings independent of the Act.

32. The Court of Appeal held that the labour officers had validly acted on behalf of the plaintiff, and the agreement approved by the permanent secretary constituted a bar to a separate action independent of the Act.

33. There is provision for cancellation of the agreement, if an application is made in that behalf, on specified grounds, by the employer or the workman. The first and second defendants did not make an application to court for cancellation of the agreement. The plaintiff alleged that more than three months was taken to return the sum of $9,100.00 to Tower Insurance (Fiji) Limited, by which time the period available for cancellation of the agreement had lapsed, and that the first and second defendants made no attempt to do so within the available time. The plaintiff also did not make an application for cancellation of the agreement.

34. The court is of the view that insufficient care was shown in preparing and sending the agreement for the permanent secretary's signature. The lack of care caused prejudice to the plaintiff in that he has not been able to claim damages from the employer. The plaintiff is right in saying that the first named first defendant was negligent in performing duties under the Act. The first named first defendant was the labour officer in charge of the accident investigation and was in carriage of the plaintiff's labour file from 2014. The second named first defendant handled the investigation of the case in 2013 and handed over to the first named defendant in 2014. The section 16 agreement was put up for approval by the first named first defendant. The second named first defendant was not involved in the process of signing the section 16 agreement.

35. The defendants raised the plea of *res judicata* in view of the plaintiff's earlier action i.e: HBC 10 of 2015 against the defendants. That action – against the employer – was struck off without consideration of the merits. The plea of *res judicata* will not succeed. No other objection was raised regarding the maintainability of the action.

36. The plaintiff is entitled to judgment for the breach of duties by the first named first defendant. In his statement of claim, the plaintiff asked for special damages in the sum of $38,725.49 and loss of wages. The plaintiff did not give a breakdown of special damages in his evidence, but tendered airline tickets, a bank statement for the period 6 October 2016 to 4 October 2016, foreign currency sale documents and an invoice from the hospital in India.

37. The plaintiff's wife and mother accompanied him to India. The court takes into consideration the expense of the plaintiff and another accompanying person. The airfare from Labasa to Suva on 5 November 2016 is 113. 35. The aggregate cost for two passengers is 226.70. The return airfare from Nadi to Delhi on 6 November 2016 is 2,559.60 per person. The cost for two passengers is $5,119.20. FNPF released a sum of 14,020.00 in October 2016. It is not clear whether this sum was released to the plaintiff's bank account or remitted directly to the hospital in India. Nevertheless, this is considered as monies used for the plaintiff's treatment. The plaintiff is allowed special damages in the sum of 19,365.90.

38. The plaintiff's claim for loss of wages of $3,920 from the date of the accident until 31 October 2014 at the rate of 1/3 of his weekly wages of $140.00. This claim is allowed. He claimed loss of wages at the rate of $140.00 from 1 November 2014 until the date of judgment. There is no recent medical report that comments on the plaintiff's ability to work. Award of loss of wages from 1 November 2014 until 31 October 2016 would be reasonable in the circumstances. This amounts to a further 14,560.00, and aggregates to 18,480.00. The statement of claim gave no other particulars of the sums claimed as special damages.

39. In his written submissions, the plaintiff asked for general damages in the following sums: $150,000.00 for pain and suffering, $9,450.00 as nursing care and $184,223.06 as loss of earnings. The plaintiff went into great detail in explain the hardships faced by him as a result of the accident. The following medical reports are helpful in assessing the general damages.

40. A medical report dated 21 November 2013 given by Dr. Alan Biribo of the Labasa hospital stated:

> "The above mentioned patient was referred to me in September 2013 for left lower limb monoplegia and back pain.
>
> He was admitted to Labasa Hospital on 25/03/13 as a result of a fall whilst at work. His initial x-rays did not reveal any fracture however he had ongoing backpain and definite neurology
>
> An MRI done on him last month showed evidence of an injury across the T11/T12 disc with posterior disc prolapse and subsequent narrowing across the canal at that level. The spinal cord does not show any signal change but does appear bulky suggestive of a resolving contusion to the cord at that level.
>
> This scan was reviewed with the visiting Neurosurgical team from India (Sahyadri Hospital) who were also of the same opinion.
>
> Unfortunately, this is not surgically correctable lesion. We will have to wait and see what recovery Navneet will have over time. I doubt he will be able to attend normal work and will continue to review with me until September 2014 at which point I will be able to assess his permanent disability. I think this report should suffice in explaining that he will not be able to attend to work till September 2014 as neurologically he has not made much progress and I do not think he will improve much more by then. As such, we expect this report to be documentation to support his absence from work the diagnosis being:
>
> - T11/T12 disc rapture (traumatic)
> - Thoracic cord contusion (partial cord lesion)
>
> If he is miraculously better before September 2014, we will be sure to inform you and change his assessment accordingly".

41. A medical report by Dr. Jaoji Vulibeci, medical superintendent of the Labasa Hospital was issued on 1 September 2016. He stated that the patient initially came to the Labasa hospital on 25 March 2013. The report stated that MRI results revealed injury across the T11/ T12 disc with posterior disc prolapse and subsequent narrowing across the canal at that level. It stated that the spinal cord did not show any signal change, but appeared bulky, suggestive of a resolving contusion to the cord at that level.

The report went on to state:

> "In this admission, Navneet was found to have the following abnormalities on physical examination:
> - Numbness of the left lower limb
> - Diminish sensation from T12 to S2 on the left lower limb

§ 3/5 power in left hip flexion
§ 2/5 power in left knee extension, knee flexion, ankle dorst/plantar flexion
§ Gaint abnormality: use of single shoulder crutch to aid walking

For the past months, Navneet's visit to the hospital has become more frequent and has been getting pethidine injections twice a day.

As for the above mentioned, Mr Navneet is been admitted with us to help manage his pain and getting him abroad for further treatment".

42. An MRI scan performed on the plaintiff by the hospital in India states in its report dated 7 November 2016 that according to clinical records, he was having a three year old spinal cord injury.

43. The medical reports issued in 2013 and 2016 show that the applicant's injuries have been slow in healing and confirm the discomforts he has undergone in living a normal life. Considering the totality of the circumstances, a sum of $30,000.00 would be adequate compensation as general damages for the plaintiff's pain and suffering and loss of other amenities. Judgment is granted against the first named first defendant and the second defendant. The second defendant is vicariously liable as the employer.

ORDER

A. Judgment is granted in favour of the plaintiff against the first named first defendant and the second defendant.

B. The defendants are to pay the plaintiff $67,845.90 within 28 days of this judgment.

C. The defendants are to pay the plaintiff $4,000.00 as costs summarily assessed within 28 days of this judgment.

Delivered at **Suva** *via Skype* on this **6th** day of **September, 2023.**

M. Javed Mansoor
Judge