

IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

ORIGINAL JURISDICTION

CASE NUMBER: ERCC 11 of 2019

BETWEEN: VIJAY KUMAR

PLAINTIFF

AND: UNIVERSITY OF FIJI

DEFENDANT

Appearances: Mr. D. Nair and Mr. N. Sharma for the Plaintiff.

Mr. N. V. Kumar for the Defendant.

Date/Place of Judgment: Thursday 16 February 2023 at Suva.

Coram: Hon. Madam Justice Anjala Wati.

RULING

A. Catchwords:

Employment Law - Does the Court have jurisdiction to hear the claim by the plaintiff which seeks to challenge the decision of the employer to terminate the plaintiff from his employment: a decision made under the provisions of the University of Fiji Act 2011 or is the jurisdiction ousted by s. 173 (4) (d) of the Constitution of Fiji - Does lack of jurisdiction mean that there is no cause of action, a claim is frivolous or vexatious or is otherwise an abuse of the process of the Court?

B. Cases:

1. *Nikhat Shameem v. Fiji Higher Education Commission ERCC 18 of 2020.*

C. Legislation:

1. *Constitution of Fiji: s. 173 (4) (d).*
 2. *University of Fiji Act 2011: s. 6.*
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Cause

1. The plaintiff and the defendant had been in an employment relationship since 3 July 2017 until he was terminated from work on 27 April 2019. The plaintiff was employed as a Human Resources Manager. He has filed an action challenging the termination of his employment.

2. After the matter reached the trial stage, the defendant filed an application to strike out the claim on the following grounds:
 1. *That the Court does not have the jurisdiction to hear the claim against the decision of the employer taken under the University of Fiji Act 2011 to suspend, investigate and terminate the plaintiff in that the Constitution of Fiji by s. 173 (4) (d) ousts the jurisdiction of the Court.*

 2. *Since the Court does not have jurisdiction to hear the claim, it follows that the claim does not disclose any reasonable cause of action, is frivolous or vexatious, or is otherwise an abuse of the process of the Court.*

3. Grounds 1 and 2 are inter-related. Both the grounds rely on the fact that the Constitution does not permit the decision of the University made under the University of Fiji Act 2011 to be challenged in Court. The application for striking out is opposed.

4. An appointment and removal of a staff of the University is made under s. 6 (1) of the University of Fiji Act 2011. Consequently, it is only under s. 6 (1) of the University of Fiji Act 2011 that the plaintiff could have been appointed or removed.

Submissions/Law and Analysis

5. Before I deal with the issue I must say that in the recent past I had been confronted with the same issue in the case of ***Nikhath Shameem v. Fiji Higher Education Commission ERCC 18 of 2020*** in which I had found in favour of the employer that the worker could not challenge her suspension and termination as s. 173 (4) (d) precluded her from bringing such an action. I have revisited the same issue in this case and am of the view that this case faces a similar hurdle. However I will still proceed to make a finding in this case specifically.
6. The issue is to determine to whether the Court has jurisdiction to hear the plaintiff's claim for unlawful and unfair termination of employment? The crucial provision based on which the issue was raised is s. 173(4) (d) of the Constitution of Fiji. The section in its material part reads:

“173(4) Notwithstanding anything contained in this Constitution, no court or tribunal (including any court or tribunal established or continued in existence by the Constitution) shall have the jurisdiction to accept, hear, determine, or in any other way entertain, or to grant any order, relief or remedy, in any proceeding of any nature whatsoever which seeks or purports to challenge in question...

(d) any decision made or authorized, or any action taken, or any decision which may be made or authorized, or any action which may be taken, under any Promulgation, Decree or Declaration, and any subordinate laws made under any such Promulgation, Decree or Declaration (including any provision of any such laws), made or as may be made between 5 December 2006 until the first sitting of the first Parliament under this Constitution, except as may be provided in or authorized by any such Promulgation, Decree or Declaration (including any provision of any such laws), made or as may be made between 5 December 2006 until the first sitting of the first Parliament under this Constitution”.

7. It is very clearly spelt out in the above section that the laws that comes within the ambit of the above provision are the laws made between 5 December 2006 and the first sitting of Parliament (6 October 2014).

8. Is there a timeline for the decisions as well? The above provision encompasses all decisions that are made or that may be made in future under the laws made in the operational period. The section does not exclude decisions made outside the period between 5 December 2006 and 6 October 2014.

9. The University of Fiji Act 2011 was made between the operational periods identified in s. 173(4) (d) of the Constitution. The decision to suspend, investigate and remove the plaintiff was made under s. 6 (i) of the University of Fiji Act 2011 as that is the section that empowers the appointment and removal of staff of the University. It states that:

“The University shall have power to ...appoint persons to and to remove them from such offices instituted, to prescribe the conditions of service of staff and to provide for their discipline”.

10. The plaintiff’s claim for unlawful and unfair termination of employment therefore cannot be challenged in Court by virtue of s. 173(4) (d) of the Constitution.

11. I therefore find that the Constitution of Fiji ousts the jurisdiction of this Court to hear the action brought by the plaintiff. If there was a provision in the University of Fiji Act 2011 allowing the employees to bring an action against the employer then the exception in s. 173(4) (d) will be applicable as the section says that if a provision in those laws allows for the bringing of an action against the

decision made then an action can be brought and the Court's jurisdiction is not ousted.

12. The plaintiff's counsel argued that s.15 (2) of the Constitution allows for access to courts and tribunals. It does. I do not disagree with that. However, when it comes to the issue of whether s. 173(4) (d) is the overriding provision, the usage of the words in that section itself that "**notwithstanding anything contained in this constitution**", makes it clear that all other provisions are subject to this provision.
13. The plaintiff has also argued that s. 20 of the Constitution states that every person has a right to fair employment practices, including humane treatment and proper working conditions. That is part of the plaintiff's claim which cannot be saved in this proceeding in which I do not have jurisdiction.
14. I was also asked to consider that this is an employment matter and that s. 173(4) (d) does not apply. Section 173 (4) (d) of the Constitution does not provide for any such exception. There have been previous matters in the employment court which have been terminated on the same basis.
15. In light of my findings on the issue of jurisdiction, I do not consider it prudent to delve into the ground that the claim does not disclose any reasonable cause of action, is frivolous or vexatious or otherwise an abuse of the process of the Court. However, it is important if I make a brief observation on this issue. This ground is generally not co-related with the ground that the Court does not have jurisdiction to deal with the cause.
16. The ground is only asserted when the Court has jurisdiction to hear the claim. Once the Court has jurisdiction to deal with the matter, it will then examine whether the claim discloses recognizable causes of action, is not frivolous and

vexatious or otherwise an abuse of the process of the Court. If the Court does not have jurisdiction to deal with the proceedings, it cannot deal with the claim and examine whether the causes of actions are recognizable in law, is not frivolous and vexatious or otherwise an abuse of the process of the Court.

Costs

17. The defendant has asked for costs in the matter. In a normal situation, it is entitled to costs. However, this is an employment situation where the plaintiff is now unemployed by the defendant. He is alleging unlawful and unfair dismissal but cannot challenge the decision of the employer in any Court. I find that there should not be any order for costs against him.

18. Further, the defendant has made this application very late when the matter is ready for trial. This could have been avoided if an early application was filed.

Final Orders

19. In the final analysis, I make the following orders:

- (a) *The Court does not have jurisdiction to hear and determine this matter. The proceedings against the defendant is terminated. Each party shall bear their own costs of the proceedings.*



Anjala Wati
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Hon. Madam Justice Anjala Wati
Judge
16 .02. 2023.

To:

1. *Nilesh Sharma Lawyers for the Plaintiff.*
2. *Krishna & Company for the Defendant.*
3. *File: ERCC 11 of 2019.*