

IN THE SUPREME COURT OF FIJI
[CIVIL APPELLATE JURISDICTION]

(CIVIL PETITION NO. CBV 0011 OF 2018)
(Fiji Court of Appeal No. ABU 120 of 2016)
(High Court Civil Action No. HBC 086 of 2008)

BETWEEN : **MOHAMMED SHAMSHER KHAN**

Petitioner

AND : 1. **PERMANENT SECRETARY FOR WORKS & ENERGY**
2. **ATTORNEY GENERAL OF FIJI**

Respondents

Coram : **Acting Chief Justice Kamal Kumar, P**
Jayawardena, J
Quentin Loh, J

Counsel : **In Person**
Ms. M. Motofaga

Date of Hearing : **20 August 2019**

Date of Judgment : **28 August 2019**

JUDGMENT

Kumar, P

1. I agree with the reasoning and conclusion of His Lordship Justice Quentin Loh.

Jayawardena, J

2. I have considered the draft judgment and agree with the findings and conclusion of the draft judgment of Justice Loh.

Quentin Loh, J

3. The Petitioner, Mohammed Shamsheer Khan (the “Petitioner”), seeks leave to appeal to the Supreme Court of Fiji under Chapter 5, Part A, Section 98 of the Constitution of the Republic of Fiji.
4. The Petitioner was employed at the Public Works Department (“PWD”) in Lautoka from 1980 to 2005 as a non-permanent unestablished staff, that is to say, he was engaged from time to time and his contract would terminate at the end of each project.
5. The Petitioner commenced an action in the High Court at Lautoka against the 1st Respondent, the Permanent Secretary for Works and Energy and the 2nd Respondent, the Attorney-General of Fiji. Adopting the paragraph numbers that appear in the Petitioner’s Statement of Claim, the material averments of the Petitioner’s claim are as follows:-
 3. **THE** Defendant’s reason for terminating the [Petitioner’s] service was “No Work available. [sic]
 4. **THE** terms and conditions of the [Petitioner’s] service with the [Respondents] was covered by the Joint Industrial Collective Agreement.
 5. **THE** [Respondents’] termination of the [Petitioner’s] employment was in breach of the said Joint Industrial Collective Agreement in that the longest serving member would be the last to go.
 6. **THE** [Respondents] have also discriminated against the [Petitioner] in their selection process in that new workers have been absorbed into the service to the exclusion of the [Petitioner].

7. **IN** the premises the [Respondents] have wrongfully terminated the [Petitioner's] service.
6. The Petitioner claimed general damages for wrongful termination, a declaration that the Respondents, being a Public Authority, were guilty of discriminatory practice in the selection of workers within the unestablished sector of the PWD, aggravated damages for discriminatory practice, a declaration that the Petitioner is entitled to be a member of the unestablished staff as against the new recruits of the same calling, loss of income from December 2005 and costs on a solicitor/client indemnity basis.
7. In its Defence, the Respondent averred, *inter alia*, that the Petitioner was employed on a casual and temporary basis and upon completion of a project, the Petitioner's employment came to an end as well. The Respondent admitted para.4 of the Petitioner's Statement of Claim, *ie.*, it admitted that the terms and conditions of the Joint Industrial Collective Agreement ("JIC Agreement") covered the service of the Petitioner. The Respondent further averred that the JIC Agreement had a grievance procedure which the Petitioner had not exhausted before bringing this action. The Respondent denied paras. 5, 6 and 7 and averred that the matter should have gone to the Employment Relations Tribunal.
8. At a pre-trial conference, the first agreed issue was:
- "Whether there has been non-compliance by the [Petitioner] and/ or the [Respondent] of the provision of the Joint Industrial Collective Agreement"*
9. At trial, the learned Trial Judge stated the basic issue to be whether the Petitioner deserved to be treated as a permanent unestablished employee; the answer would determine whether or not the Petitioner was entitled to certain benefits, and ultimately, whether or not he was unlawfully terminated and therefore, entitled to damages for unlawful termination.
10. A considerable amount of trial time was spent on the "Nominal Roll" on which the Petitioner's name appeared, whether it was an official or unofficial roll, what was the

practice of the PWD for persons on that Nominal Roll and whether they were they entitled to become non-established permanent workers of PWD's workforce. The evidence on this appears mixed. The evidence showed that there were two categories of PWD workers, permanent and non-permanent workers. Initially the latter category had two sub-categories, established non-permanent workers and non-established non-permanent workers. As the evidence unfolded, it appeared that the former category also had a sub-category called permanent non-established workers. That was the sub-category the Petitioner claimed he should have been in if not for the discrimination.

11. At the end of the trial, the learned Trial Judge essentially found in favour of the Petitioner - that he was on the nominal roll, that he was however, always engaged as a temporary unestablished worker even after his name was put onto the nominal roll, the Petitioner was "...entitled to be treated as a permanent unestablished employee and be engaged on a single continuous contract from 2002" and it followed that if the Respondent had treated the Petitioner "...properly as a permanent unestablished employee, then it should have given [the Petitioner] notice and complied with the procedures set out under the JIC Agreement."
12. The Respondent appealed. The second and third grounds of appeal are relevant and were as follows:-
 - (a) The learned judge erred in fact and in law by ignoring the fact that the JIC Agreement was not tendered in Court nor any reference made to specific provision in the JIC Agreement by the Petitioner;
 - (b) The learned judge erred in fact and in law in holding that the Petitioner should have been given notice and that the Respondent had failed to comply with the procedures set out under the JIC Agreement. The learned Judge also did not specify the procedures under the JIC Agreement that were breached and by ignoring the fact that the Petitioner had failed to raise or specify the procedures under the JIC Agreement that had been breached.
13. The Court of Appeal ruled that the reliance on and the "pertinence" or relevance of the JIC Agreement was unquestionable yet the Petitioner did not tender this important

document into the evidence. The importance of this document was very clear from firstly, paragraphs 4 and 5 of the Petitioner's own Statement of Claim set out above; secondly, the Petitioner clearly relied upon the JIC Agreement and referred to certain provisions therein albeit without citing numeric references; thirdly, even at the pre-trial conference, the first agreed issue was: "Whether there has been non-compliance by the Plaintiff [Petitioner] and/or the Defendant [Respondent] of the provisions of the [JIC] Agreement." The Court of Appeal held that the learned Trial Judge's central ruling set out at paragraph [11] above – that if the Respondent had treated the Petitioner properly then it should have given him notice and complied with the procedures set out under the JIC Agreement – could not be allowed to stand in the absence of the JIC Agreement and its provisions in evidence before him, and allowed the appeal on that ground alone. We would add that nowhere in the learned Trial Judge's judgment does it state what exactly that notice should contain, how it was to be served and what procedures should have been complied with under the JIC Agreement.

14. The Petitioner, a litigant-in-Person, has come to this Court asking for leave to appeal to the Supreme Court. The Petitioner has filed his submissions (making references to the evidence) and states his "Grounds of Appeal" as follows:

- (a) The Petitioner was employed by the PWD from 1980 to 2005; his name was on the nominal roll and workers on that roll were absorbed into the PWD's workforce as permanent un-established employees; he was thus entitled to become a permanent unestablished employee and that entitled him to unconditional permanent benefits. Other workers on the nominal roll were absorbed into the workforce as permanent unestablished employees, but he was not. It is clear he was denied this absorption due to unfair employment practice by the Respondent which resulted in his termination and making him redundant.
- (b) There was discriminatory and unfair employment practice and there was a conspiracy against him to oust him forever from the PWD. The Respondents failed to address the Petitioner's grievances from way back in 2002 and if his

grievances were investigated in an acceptable manner and with urgency, the Petitioner would not have suffered in terms of his unemployed status.

- (c) The Petitioner did raise the issue of the JIC Agreement and it "...should be noted with caution that [the Petitioner] never led the JIC Agreement in evidence." There can be no doubt about the existence of the terms of the JIC Agreement, the evidence made references to provisions in the JIC Agreement, like "section xiv clause 181 (iii)" on the last in first out procedure (in a letter from the Petitioner's Union to the CEO Ministry of Works and Energy and a letter from the Divisional Engineer Western to the Permanent Secretary for Works and Transport); the Court of Appeal failed to recognize that the relevant clause in question was "...already exhibited.." without any dispute or objection from the Respondent; that the Respondent relied on the JIC Agreement to cross-examine the Petitioner and in their submissions to the High Court; that the Petitioner could not put the JIC Agreement into evidence because his Union ceased to operate prior to 2008 and that he could not obtain a copy despite various attempts from other sources; the Court of Appeal failed to address whether the Respondents had an obligation in good faith to assist the Court with the JIC Agreement which they had at their disposal and upon which the Respondents also relied.
- (d) The Respondents deviated from their rules of fair employment practice; this was prejudicial to the Petitioner; "...[a]ll employment agreements consist of clause [*sic*] referring to fair employment practice and JIC Agreement was no exception";
- (e) There was compelling evidence given by witnesses; "...these raises questions of Law in regards to names incorporated in the nominal roll, the employees on that roll received permanent benefits and [the Petitioner] was denied his right to also receive similar permanent benefits. This shows unfair and discriminatory practice on the part of the Respondents."

- (f) The issue of unfair and discriminatory practice needs to be decided by the Honourable Court as it raises a question of Law, and “..for the interest of justice and humbly state that it becomes a public importance.”
- (g) The case raises a far reaching question of law that the Court of Appeal erred in law when it considered that the High Court had not considered the JIC Agreement when it fact it was never led in evidence by the Petitioner.

15. In their Submissions, the Respondents submit there is only one real ground of appeal, [viz] the Petitioner’s name was on the nominal roll and thus entitled him as a permanent established employee. The Respondents also repeat and support the grounds set out by the Court of Appeal in its judgment. In particular the Respondents submit that the Petitioner’s case was premised on a breach of the JIC Agreement and the onus was on the Petitioner to produce that Agreement and prove those terms and conditions he says were breached.

16. The Supreme Court of Fiji does not exist or serve to function as a further level of appeal beyond the Court of Appeal. It is settled law that under section 7 of the Supreme Court Act 1998, the Supreme Court “...must not grant leave to appeal unless the case raises”:

- (h) a far-reaching question of law;
- (i) a matter of great general or public importance; or
- (j) a matter that is otherwise of substantial general interest to the administration of justice.

17. Authoritative and settled case law has interpreted this provision as laying down the rule that special leave is not granted unless the case is one of gravity involving a matter of public interest, or some important question of law, or affecting property of considerable amount or where the case is otherwise of some public importance or of a very substantial character; see eg., *Bulu v. Housing Authority* [2005] FJSC; CBV 11 of 2004 (8 April 2005); *Dr. Ganesh Chand v. Fiji Times Ltd* [2011] CBV 5 of 2009 (apf. ABU 35 of 2007, (26 April 2011); *Praveena’s BP Service Station Ltd v. Fiji Gas Ltd* [2011]

CBV 18 of 2008 (apf. ABU 74 of 2007) (26th April 2011) *Star Amusement Ltd v. Prasad* [2013] FJSC 8; CBV 11 of 2012 (23 August 2013), *Jubilee Juice Distributors v. Jai Dhir Singh* Civil Petition No. CBV 0006 of 2014 and *New World Ltd v Vanualevu Hardware (Fiji) Ltd* [2013] CBV 0005 of 2012 (apf. ABU 65 of 2011) (23 August 2013).

18. Whilst we do sympathise with the Petitioner as a litigant-in-person, we cannot bend the rules of evidence nor alter our time honoured principles in relation to the reception of evidence and proof of a party's case. The Court of Appeal was entirely correct to hold that the Petitioner's case for breach of the terms and conditions of the JIC Agreement and wrongful dismissal before the High Court and the Court of Appeal was based upon the terms and conditions of the JIC Agreement. Indeed we would add that those terms and conditions were crucial if not critical to the Petitioner's case and the issues raised before the courts.
19. The very nature of the JIC Agreement and the references in correspondence to a provision like clause 181(a)(iii) shows the level of detail those clauses, sub-clauses and paragraphs in the JIC Agreement must have contained. References to provisions in correspondence is not proof of the provisions or their content or context. The failure to tender the JIC Agreement into the evidence was fatal to the Petitioner's claim.
20. Although the Respondent admitted that the terms and conditions of the JIC Agreement covered the employment of the Petitioner, it was always the burden of the Petitioner to prove what those terms and conditions relevant to his case were, see paras. [5] and [8] above. Insofar as the defence of the Respondent averred the Petitioner had not exhausted his remedy under the grievance procedure pursuant to the JIC Agreement, the burden on what was covered by that procedure and what it entailed lay squarely on the Respondent. However, neither the High Court nor the Court of Appeal reached that defence because the Petitioner's claim was not made out in the first place.
21. It is also clear beyond peradventure that this case does not entail any far reaching question of law or a matter of great general or public importance or a matter that is otherwise of substantial general interest to the administration of justice. This is not a

case of gravity involving a matter of public interest, or some important question of law, or affecting property of considerable amount or where the case is otherwise of some public importance or of a very substantial character.

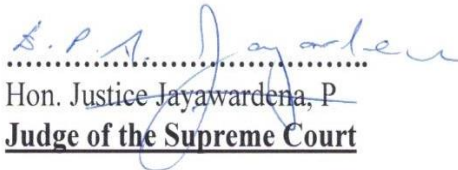
22. It follows the special leave to appeal has to be denied and the Petition must be dismissed.

Orders of the Court


1. The application for special leave to appeal is refused and the application is dismissed.
2. Bearing all the circumstances of this case and the fact that the Petitioner is a litigant-in-person, we make a no order as to costs.



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Hon. Acting Chief Justice Kamal Kumar
President of the Supreme Court



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Hon. Justice Jayawardena, P
Judge of the Supreme Court



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Hon. Justice Quentin Loh
Judge of the Supreme Court

Solicitors:

Mohammed Shamsheer Khan - Appellant In Person.

Office of the Attorney General of Fiji - Respondents.