Employment Relations Tribunal

Decision

Title of Matter:	**Dinesh Kumar** **v** **Fiji Sugar Corporation (FSC) Limited**
Section:	**Section 211 (1)(k)*Employment Relations Act 2007***
Subject:	**Adjudication of Grievance Arising Out of Dismissal**
Matter Number:	**ERT Grievance No 21 of 2018**
Appearances:	**Mr F Anthony, National Union of Workers, for the Grievor** **Mr N Tofinga, Fiji Commerce & Employers Federation, for the Employer**
Date of Hearing:	**Monday 3 September 2018** **Monday 1 October 2018**
Before:	**Mr Andrew J See, Resident Magistrate**
Date of Decision:	**19 March 2019**

KEYWORDS: Dismissal arising out of employment; Section 211 Employment Relations Act 2007; Declared Essential Service Industry; Refusal of Tribunal to deal with grievance not made according to law; Doctrine of Laches.

Background

[1]This is a grievance that has been referred to the Tribunal on 7 December 2017, in accordance with Section 194(5) of the *Employment Relations Act* 2007. The grievance is an unusual one, as it relates to events that have their origins in 2008, when the Employer reported Mr Dinseh Kumar to the police for being involved in the theft of concrete sleepers the property of FSC. The Grievor claims that he was suspended, rather than dismissed, pending the outcome of the complaint of larceny being dealt with in the Nadi Magistrates Court, whereas the Employer claims that Mr Kumar was terminated in his employment on 27 January 2009. In the ordinary course of events, a worker who wishes to submit an employment grievance to the Labour Officer, must do so within a six month window from when the grievance arose. Yet given the time lag involved on this occasion, the Tribunal was keen to understand whether there may have been some argument that the Employer had waived its right to terminate the Worker[1] or whether the Tribunal had properly exercised its

[1] *Singh v Lautoka City Council* [1978] FJSC 66; Action 120 of 1977 (8 May 1978)

discretion to extend the time period for the submitting of a grievance beyond the six months, where there was good reason for the delay[2].

[2]In hindsight, perhaps those questions were not the correct ones to initially ask, as it was the case that the grievance had been lodged at the direction of Prakash RM on 25 August 2017, following a successful motion filed by the Employer to strike out an Employment Dispute filed by the Fiji Sugar and General Workers Union[3] on 10 June 2015. That initial dispute was described by the Union in these terms:-

- It was alleged misconduct;
- No joint investigation with the Union was conducted;
- No termination letter was given to Mr Kumar when he was told to go home;
- Failure of the Company to forward the investigation report that he claim to have been conducted;
- Mr Kumar's suspension/termination was unlawful, unfair, unjust and we seek full compensation for all loss (sic) wages and benefits, all legal costs incurred and to be reinstated to his position as change crew driver;
- Compensation should be effective from the date he was told to go home till he is reinstated.

[3] There is no reasonable explanation that has been provided to the Tribunal, as to why this initial dispute was so long in the making. The Employer contends that Mr Kumar was summarily terminated on 27 January 2009 for "gross misconduct in that (he was) involved in theft of concrete (sleepers) from FSC". The Nadi Magistrates Court dismissed the charges against the Grievor on 11 August 2014. The employment dispute was not filed until 10 June 2015 and thereafter referred to the Chief Tribunal on 20 July 2015. It is unfortunate that from the first listing of the matter on 17 September 2015, there have been a series of issues, including the non-attendance of both parties, that had delayed the expeditious determination of the matter. The matter was not listed before Prakash RM until March 2017, when the Employer by Notice of Motion agitated that the employment dispute be struck out, on the basis that the corporation was an Essential Service and Industry Employer for the purposes of Part 19 of the *Employment Relations Act* 2007. It is perhaps useful to note that the definition of that expression as contained within Section 188 of the Act only came into force on 11 September 2015, that is three months after the employment dispute had already been lodged and provided:

> the *"essential service and industry" or "essential services and industries" means a service listed in Schedule 7 and includes those essential national industries declared and designated corporations or designated companies designated under the Decree, and for the avoidance of doubt, shall also include—*
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> *(a) the Government;*
> *(b) a statutory authority;*
> *(c) a local authority, including a city council, town council or rural authority;*
> *(d) Government commercial company, as prescribed under the Public Enterprise Act 1996;*
> *(e) a duly authorised agent or manager of an employer; and*

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2 See Section 111 of the Act.

3 That Union is now known as the National Union of Workers.

(f) a person who owns, or is carrying on, or for the time being responsible for the management or control of a profession, business, trade or work in which a worker is engaged;

[4] This Tribunal is not aware of any declaration or designation pertaining to the FSC, nor of any prescription that has been made under the *Public Enterprise Act* 1996. There is no other part of the definition of these terms that would appear to have any application to the Employer. The result of all of this, is likely to mean that the employment dispute initially lodged by the Union was set aside in error. The reason for that error seems based on the strength of the Employer's Affidavit accompanying the strike out motion, where it stated:

> *"the Chief Tribunal ordered in the matter ERTMA No 31 of 2015… that the Fiji Sugar Corporation is an Essential Services Industries Employer and as such is covered under the newly amended provisions of the Part 19 of the Employment Relations Promulgation …"*

Reliant on that submission, my sister Magistrate acted in good faith and struck out the dispute, allowing the Union to refile a grievance within the 21 day window, that was otherwise provided for in the case of Part 19 employers, in accordance with Section 188(4) of the Act.

Preliminary View of the Tribunal

[5] After considering the views of the parties, this Tribunal took a different position from that of Prakash RM and the reason for this, was because the Employer had albeit perhaps unintentionally, misled the Honourable Magistrate by suggesting that it was an essential service and industry employer. This Tribunal was of the view that the Employer had not been "declared an essential service and industry" nor was it caught by the definition of "essential service and industry" or "essential services and industries" as those expressions were defined within the Section 188 of the *Employment Relations Act* 2007, following the *Employment Relations (Amendment) Act* 2015.

[6]The reason for holding that view, is that files notes held by this Tribunal in relation to *ERTMA No 31 of 2015,* record the Chief Tribunal advising that as at 12 October 2017, that is, at a time after her Worship's Orders had been issued, no such decision had been made as to the status of the Employer, but instead the matter had been referred to the Employment Court on 18 August 2016 and the Employment Relations Tribunal advised to:

(i) Either call for submissions from the parties and refer to the Employment Court for consideration; or
(ii) Remit the file to the Employment Court for directions on the submissions on the issue and that the Court will give a decision upon hearing the parties.

[7] Neither party in these proceedings were able to provide any further evidence of the advancement of that matter in Case ERTMA *No 31 of 2015.*

[8]Further and in any event, if my sister Magistrate was correct in classifying the Employer in that way, any grievance pertaining to the dismissal of employment of a Part 19 employee, would need to be lodged within 21 days from when the grievance first arose[4]. That is, there was no

[4] See Section 188(4) of the Act.

statutory power for the Tribunal to extend the time period for when a grievance could be brought.

[9] Despite all of this, the Tribunal struck out the dispute that was on foot and asked that Mr Kumar file a grievance in the matter. It was in response to the fact that the grievance remained unresolved after having the parties submit to mediation, that this Tribunal sought preliminary submissions on the question of its standing.

Preliminary Submissions of the Grievor

[10]In relation to the history of the issues, the Union on behalf of the Grievor provided the Tribunal with the following submission:

- Some time around November 2008, the Grievor was reported to police for theft of the Employer's property. It was claimed that he was told to stay home until his case in the Magistrates Court was determined.
- The case before the Magistrates Court was dismissed on 4 March 2015[5].
- The Union wrote to the Employer on 16 March 2015, challenging the suspension and asking "FSC to reinstate him[6]"
- Various communications ensued between the parties, until when on 10 June 2015, the Permanent Secretary was notified of a dispute.
- The dispute was referred to the Tribunal where directions were issued by Prakash RM for the parties to address preliminary questions, including an application of the Employer to strike out the matter pursuant to Section 188(1) and (2) of the 2015 *Amendment Act*.
- RM Prakash issued a decision on 25 August 2017, agreeing to the application to strike out the dispute, but allowing the Grievor to submit a grievance within 21 days.
- That grievance was lodged on 6 September 2017 and a mediation activity held under the auspice of the Mediation Service on 11 September 2017.

Submissions of the Employer

[11]The essential thrust of the Employer's submissions concern the difficulties it would now face, if it was required to defend the dismissal decision some 10 years on. In an Affidavit of Mr Kameli Batiweti sworn on 6 August 2018, the deponent was of the belief that the Grievor had been terminated in his employment on 27 January 2009. Within that Affidavit, Mr Batiweti referred to the only available documentation maintained by the Employer, that included:-

- A letter from Mr Velaidan Goundar, Branch President, Fiji Sugar and General Workers Union dated 19 October 2015, confirming the Grievor' s termination in employment; and

- A letter of termination dated 27 January 2009, addressed to Mr Dinesh Kumar from the General Manager FSC.

[12]It is perhaps useful at this point to provide an extract from the termination letter from the FSC General Manager dated 27 January 2009, where it reads:

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5 That date is not the correct date, as the Certificate of Court Proceedings shows that the matter was dealt with on 11 August 2014.

6 The concept of reinstatement is more suggestive of the fact that the Grievor had been terminated, not suspended in his employment.

This is to inform you that a formal Internal Inquiry was ordered to investigate you for possible misconduct while being employed in Change Crew Driver at the Traffic Department. You were given a further opportunity to comment on the finding of the Inquiry and the evidence against you on 27th January 2009.

Following the interview and after we had given the fullest consideration to all the matters that you had raised in your defense, we advise you that we were satisfied that you were guilty of gross misconduct in that you were involved in theft of concrete slippers (sic) from FSC Nadi.

We have given full consideration to everything that you told us in mitigation, but have concluded that in all the circumstances summary dismissal is the appropriate action to take.

Your employment is therefore terminated effective from 27th January 2009 as per Section 33(a) of the Employment Relations Promulgation 2007 for gross misconduct.

Yours faithfully

GENERAL MANAGER

[13]The Employer also relies on the equitable doctrine of laches, to claim that it would be unfairly disadvantaged now, should the arbitration of the grievance be allowed. In essence, the doctrine of laches, provides that a legal right or claim will not be enforced or allowed, if a long delay in asserting the right or claim has prejudiced the adverse party[7].

Consideration of Issues

The Grievance Lodged on 6 September 2017

[14]The grievance that has been lodged by Mr Kumar in response to the direction of Prakash RM states in part:

My suspension and termination was unlawful, unfair, unjust and I seek full compensation for all loss (sic) wages and benefits, all legal cost incurred and to be reinstated to my former position as change crew driver.

[15] And this is where the present situation for all concerned becomes complicated. Because, even if it was the case that Mr Kumar is a Chapter 19 employee, there is nothing within the Act that gives the Tribunal a discretion to extend the time period for the filing of a grievance, from the statutory direction found at Section 188(4) of the Act, that it must take place within 21 days from the date which the grievance first arose. Within her decision, her Worship stated that the Union had submitted that the grievance arose on 16 March 2015. If that were the case and the 21 day time limit in the case of a Part 19 employee were to apply, it would simply be impossible for the Grievor to pursue a dismissal grievance under the statute. A grievance that comes about in those circumstances and is referred to the Tribunal from the mediation service, cannot be entertained. It is not a matter, as is suggested by the Union, that this Tribunal has no jurisdiction to overturn the decision of another Tribunal. Of course, there is no capacity to do that. The Tribunal can still

[7] Whether this doctrine is strictly applied in the case of employment law, is not entirely clear. (See for example, *Holy Family School Dismissal Case* (1975) AR 991)

nonetheless refuse to exercise any powers where it believes that it has no standing or capacity to do so.

The Fate of the Original Dispute

[16] But that is not the end of the matter. From an equitable point of view, the Grievor has been prejudiced by the fact that the initial dispute that was lodged was struck out by Prakash RM. The dispute was struck out as a result of an error or mistake relied upon by her Worship and that situation ought to be corrected.

[17]But where does that leave the parties? The original dispute that was lodged in June 2015, was referred directly to the Tribunal, whereas the grievance lodged on 6 September 2017, was the subject of a mediation activity on 7 December 2017. For practical purposes, the parties were given an opportunity to resolve the matter by mediation, but there was no amicable resolution. This Tribunal is mindful of the obligation it has under Section 216(2) of the Act, to act fairly. And so it would seem that to do this, one must now consider the best way forward to correct the current situation. The Tribunal must make a decision, as to whether there is any merits in the case before it, particularly given the circumstances as to how the matter was brought about. The question is not simply what are the merits of the case, but whether or not the grievance or dispute before the Tribunal has been appropriately brought and has any real prospects of success.

Was the Grievor Dismissed?

[18]The Tribunal is of the view that the Grievor was terminated in his employment by letter dated 27 January 2009 and relies on the documentation as provided by the Employer to support that conclusion[8]. The Grievor should have challenged the dismissal decision at the time it was made[9]. The Tribunal does not accept at law, that an employee could remain suspended from work without pay, from 2008 to 2015 and assume that the employment relationship remained on foot.

[19]Mr Kumar could have challenged his suspension from work as soon as the matter was reported to police in November 2008. He did not do so. Mr Kumar could have challenged his employment on 27 January 2009, when the Employer issued a dismissal letter, he did not do so. In fact when the Nadi Magistrates Court dismissed the criminal complaint against Mr Kumar on 11 August 2014, he could have thereafter registered his protest against his dismissal, however he made no such efforts to do so. In fact, a further eleven months transpired, before Mr Kumar and his representatives sought to formally advance his complaint by way of a dispute.

[20]The Tribunal does not accept that this constitutes a good reason for the delay. The employment relationship does not carry on ad infinitum, particularly where there is no evidence of any contact made between the parties during the intervening six year period. The Tribunal is satisfied on the balance of probabilities, that the Employer issued a dismissal letter. The main reason comes out of the communication exchange between the Union and the Employer on and from 16 March 2015[10].

8 See letter of termination dated 27 January 2009 and letter from Mr Velaidan Goundar dated 19 October 2015.

9 The Tribunal prefers the evidence of the Employer that the Grievor was issued with a termination letter.

10 See documents contained within the Employment Dispute File 10/15

Firstly, there is a letter from the Assistant General Secretary, Fiji Sugar & General Workers Union (FSGWU) to the General Manager FSC, where it states:

> *It has been brought to the Union's attention that in November 2008 your Officers in Navo Sector, Nadi had verbally told our Union Member Mr Kumar to go home……*
>
> *There was no joint investigation carried out prior to his verbal resignation and then termination as per Clause 8(a), (b) and (c)*
>
> *The Union was not informed nor was Mr Kumar given a letter of suspension or termination on the action of the Corporation*

[21]In response, on 7 May 2015, the General Manager FSC wrote to the Assistant General Secretary and stated:

> *Please note that contrary to your claim a formal internal enquiry was carried out to investigate the possible conduct…*
>
> *After the interview Mr Dinesh was given time to raise his defense against the charges of misconduct that were raised against him*
>
> *Mr Dinesh was given a letter of termination on 27th January 2009 informing him of the effective date of the termination of his employment.*

[22]Thereafter on 14 May 2015, the Assistant General Secretary wrote to the General Manager and only focused on one aspect of the FSC response, giving the impression he accepted the other contentions contained within the Employer's letter, when he wrote:

> *We are not satisfied with your respond (sic) and we request that you forward us a copy of the investigation report,(if any was carried out) as we could not find a copy in our file.*

[23]And finally and most tellingly, is the Statement that was provided by Mr Vellaidan Goundar, then Branch President of the FSGWU -Navo Sector, where he states on 19 October 2015[11]:

> *I Velaidan (sic) Goundar hereby say that I was the president of the FSGWU based at Navo Sector. I recall that in 2008 an allegation was made by an unknown person that one Dinesh Kumar was involved in the theft of concrete (sleepers) from FSC Nadi.*
>
> *I also say that the union representative during a meeting session met with the employees at Navo with – Mr Felix Anthony (National Secretary) and Rajesh Kumar (Branch secretary-Navo). Both office bearers confirmed that union will not represent anyone who is involved in any form of theft cases.*
>
> *Thereafter the FSGWU was not part of any investigation process despite being requested by the corporation.*
>
> *I also say that due to union's non-participation, the corporation proceeded with the investigation and terminated Mr Dinesh Kumar employment….*

[11] The Tribunal accepts that these documents are only hearsay evidence, but given the history of this matter, remains persuasive evidence nonetheless.

Was the Grievor Exonerated in the Nadi Magistrate's Court?

[24]The Tribunal notes with concern, the Preliminary Submissions filed by the Union in relation to the original dispute as filed[12]. There are several inaccuracies that have been relied upon by the Union in these submissions and one can only speculate as to whether the Acting Permanent Secretary may too have been misled when accepting the initial dispute outside of the six month statutory window. In this regard Prakash RM stated within her decision:

> *I note that the Permanent Secretary accepted the report of a dispute on 10th July 2015 and in the acceptance noted its reasons for accepting the dispute outside the time limit on the premise that the matter was before the Magistrates Court.*

[25] It is a matter of record, that at the time that the dispute was filed, the case of Larceny by Servant, before the Nadi Magistrates Court, had already been dismissed. In fact the matter had been disposed of on 11 August 2014, that is a period of eleven months before the dispute was accepted by the Acting Permanent Secretary. Ordinarily, unless the delay was "caused by mistake or other good cause", the statutory time line for filing disputes is only six months[13]. It would seem most likely that the Acting Permanent Secretary was not apprised of all the relevant facts and factors when accepting the dispute as he did.

[26]More concerningly, the Union submission continued,

> *The case proceeded under Criminal Case NO: 1388 of 2008 – An offence "Larceny by Servant: contrary to section 274 (a)(i) of the Penal Code – cap17. After the hearing of the case proper, the case ruling was "I dismissed the Charge under section 171 without cost" – in favor of Dinesh Kumar.*

[27] This submission is simply incorrect. The case against Mr Kumar was never prosecuted in the Nadi Magistrates Court. There was never a "hearing of the case proper". The case was dismissed before Magistrate Azhar, under Section 171 of the *Criminal Procedure Act* 2009. That is, due to the non-appearance of parties after adjournment. The court record dated 11 August 2014 reads:

> *The civil witnesses are absent now, plus only the police witnesses are present. This is a very old case, plus pending for six years. The prosecution is not ready. I dismiss the charge under Section 171 without cost.*

[28]The case was neither heard, nor a ruling made in favour of the Grievor. The case was dismissed because of the issues that the Magistrate flagged, being a lack of witnesses, the time lag involved and the fact that the prosecution was not ready to proceed. The Union cannot claim that the Worker has been exonerated in this regard. The present matter before this Tribunal is no different. In circumstances where the Employer has stated the personnel records are no longer held and some of the key witnesses that it would otherwise rely on, would have retired, passed on, or not been easily located, brings about a situation where the present grievance (dispute) cannot be fairly determined.

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12 Dispute 10/2015.

13 See Section 170(6) of the Act.

Conclusion

[29]By way of conclusion, the Tribunal is of the view that the grievance that has been referred from the Mediation Service on 7 December 2017, was infected by jurisdictional error. The grievance only came about because of the misapprehension of my sister Magistrate, that FSC was an essential services and industries employer. The original dispute should never have been set aside, only but for the fact that the Tribunal relied on the submissions of the Employer. And even if this Tribunal is incorrect in its view and Prakash RM was correct in striking out the dispute, there was simply no capacity for the Tribunal to extend the time line for the filing of a grievance, outside of the 21 day window, from when the issue arose[14]. If on the other hand, the consequence of all of this is that the employment dispute should have been reinstated, it does not really take the matter much further. The dispute filed on 10 June 2015 by the FSGWU is for all intents and purposes the same as the grievance filed by Mr Kumar on 6 September 2017.

[30]The parties were unable to reach an amicable resolution of that grievance and it was for that reason that the issue returns to this Tribunal. The original dispute and this grievance should never have achieved any standing. In the case of the original dispute, the Acting Permanent Secretary appears to have assumed that Mr Kumar had been exonerated and the complaint made on his behalf by the Union, capable of being accepted as a dispute. The Resident Magistrate Prakash, acted on a mistaken belief that an Order had already been issued by Chief Tribunal Kuruduadua in *ERTMA No 31 of 2015,* in effect giving the Employer the standing of an essential service and industry employer. It was for that reason, that Prakash RM struck out the original employment dispute as filed and preferred that the Grievor recommence his grievance as a Chapter 19 employee, confined within the scope of a 21 day statutory window.

[31]Whether either the original dispute dated 10 June 2015 or the grievance dated 6 September 2017 should have been accepted or have standing may be an issue for a superior court, but this Tribunal is of the firm belief that in either situation that both the Acting Permanent Secretary and the Resident Magistrate Prakash acted in error, reliant on incorrect information. A worker who was dismissed on 27 January 2009, should never be allowed to bring forward a complaint of unjustified, unlawful or unfair dismissal, where it extends the realms of traditional limitation for such matters, unless of course the reasons for granting the same were so exceptional and had been adequately ventilated before the relevant court or tribunal.

[32]The Grievor did nothing but sit on his hands. Even when his case was dismissed in the Nadi Magistrates Court on 11 August 2014, his representatives made no approach to the Employer until 16 March 2015[15]. That is, seven months after his court case had been dismissed. In fact one wonders how it could be that the Union waited six years before it ventilated any protest at all regarding Mr Kumar's suspension or termination. Had that situation been known and considered by the Acting Permanent Secretary at the time, it would be quite hard to comprehend any extension of time being granted to Mr Kumar based on these circumstances. The fact too that Prakash RM was reliant on Affidavit material that was simply incorrect, also brings about a situation where the integrity of any Orders issued, would have to be brought into doubt.

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[14] See Section 188(4) of the Act.

[15] A person claiming an ongoing employment relationship would have approached the Employer immediately following such a decision, if it was the case that he or she was somehow wanting to be reliant on that ruling to activate or justify a return to work.

[33]This Tribunal finds in either scenario, that to entertain the ongoing analysis of the merits of the case, would be an attempt to exercise jurisdiction, where no such jurisdiction exists. The Tribunal can see no powers that it has to deal with a matter that has been brought about in such circumstances and appears founded on mistake and misunderstanding.

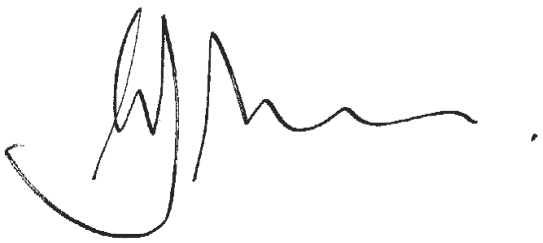
[34] This Tribunal finds that Mr Kumar has no standing to bring about a grievance as he has now done. The Tribunal also believes that the Union on behalf of Mr Kumar could have and should have agitated his employment dispute earlier than it did. It almost appears that the Grievor had sought to exploit the possible opportunity that was created by the dismissal of his charges in the Nadi Magistrates Court, so as to in some way muster an argument that if he was exonerated criminally, that he should also be exonerated civilly. The problem for the Grievor is that he was never exonerated criminally. The Grievor has brought about his own delay. His Union too did nothing for six years and only on 16 March 2015, when it believed that the Grievor was found innocent of the offence of Larceny by Servant, did it bother agitating that the dismissal decision that took place on 27 January 2009, was unfair. The Grievor cannot expect to have the merits of his case now heard 10 years following the events that gave rise to his dismissal. There is no public interest served in adjudicating this grievance. It would simply be a futile exercise against a backdrop of absent and unreliable witness evidence and where are no available company records. There are good reasons why timelines are set for such cases, in such circumstances. The grievance is dismissed.

Decision

[35] It is the decision of this Tribunal, that:

(i) The Grievance is dismissed.

(ii) Either party may appeal this decision within 28 days hereof.



Andrew J See
Resident Magistrate