Employment Relations Tribunal

Supplementary Decision

Title of Matter:	**Poasa Turaganisolevu Raqio** **v** **Fiji Sugar Corporation Limited (FSC)**
Section:	**Sections 211 (1)(k), 212 (1) and (2) and 213** ***Employment Relations Act* 2007**
Subject:	**Issuing of Orders Arising out of Proceedings**
Matter Number:	**ERT Grievance No 10 of 2019**
Appearances:	**Mr K Maisamoa, Maisamoa and Associates, for the Grievor** **Mr N Tofinga and Mr D Prasad, for the Employer**
Date of Hearing:	**7 February 2020**
Before:	**Mr Andrew J See, Resident Magistrate**
Date of Decision:	**7 February 2020**

KEYWORDS: Slip Rule, Orders issue for employee to vacate the premises of the Employer; Undertakings given between the parties to proceedings; Failure of solicitors to file change of appearance.

CASES CONSIDERED:
Arnett v Holloway [1960] VR 22
Kumar v Prasad (trading as The Royale Wine Shop) [2018] FJET 36; ERT JDS 09 of 2018 (3 December 2018)
Raqio v Fiji Sugar Corporation Ltd (FSC) [2019] FJET 44; ERT Grievance 10 of 2019 (18 October 2019)

LEGISLATION CONSIDERED:
Order 20 Rule 10, High *Court Rules* 1988
Section 210 *Employment Relations Act* 2007
Sections 211 (d), (e) and (h) *Employment Relations Act* 2007
Section 227 *Employment Relations Act* 2007
Section 234(1) (b) *Employment Relations Act* 2007
Section 236 *Employment Relations Act* 2007
Rule 10, Order 33 *Magistrates Court Rules* 1945.

Background

[1]This is a supplementary decision to one that was issued by this Tribunal on 18 October 2019[1], in which a grievance commenced by Mr Poasa Raqio, claiming that he had been unjustifiably terminated in his employment with the Fiji Sugar Corporation (FSC) was dismissed.

[1] *Raqio v Fiji Sugar Corporation Ltd* (FSC) [2019] FJET 44; ERT Grievance 10 of 2019 (18 October 2019)

[2]The original grievance was referred to the Tribunal from the Mediation Service on 1 November 2018 and an initial attempt was made to resolve the matter by way of a further Member Assisted Conciliation, in accordance with Section 210 of the Act. The matter was somewhat unique in the circumstances, as although the Grievor had been terminated in his employment on 20 September 2018, he had been unwilling to vacate the company premises in which he had resided during the course of his employment, until such time as the substantive matter before this Tribunal had been determined. That is, he did not want to vacate the premises until such time as it had been determined whether he had been unjustifiably dismissed and if so, whether he should be reinstated in his employment with FSC. The upshot of all of that being, that if he was reinstated, he would, ceteris paribus, maintain the employee benefit of residing in the FSC Penang Quarters (House number PMSH122).

[3] Despite the Grievor having earlier intimated to the Tribunal that he may not be wishing to be reinstated in his employment,[2] on 10 June 2019, with the concurrence of his then counsel Mr Nair, the following Directions were issued:

1. The Grievor was given 7 days to advise the Registry whether or not he sought the remedy of reinstatement in employment (by close of business 17 June 2019).

2. In the event that the Grievor elected to pursue a remedy of reinstatement only, he must then within no later than 21 days thereafter (by close of business 8 July 2019) vacate the FSC premises where he had been residing prior to his dismissal.

3. Should the Grievor seek to be reinstated in his employment and in the event that the Grievor was unsuccessful with his grievance, some cost contribution for the rental of the property is likely to be awarded against him, having regard to the commercial rate of leasing as provided for by the Employer and any other relevant facts and factors that needed to be taken into account.

[4]The reason for issuing Directions Orders in these terms should be fairly self-apparent. Unless in the most extraordinary of cases, which for the present purposes are simply too fanciful to consider and have never been advanced by the Grievor or his representatives[3], a worker who no longer is an employee of an employer, residing in a company house as part of a former employment remuneration package, must relinquish any claim to that benefit, subject ordinarily to any statutory period of notice to vacate. The Grievor and his former Counsel Mr Nair, were well aware of the fact. That is, that should the Grievor be unsuccessful in his claim for reinstatement, that he would be required to vacate the Employer's property.

Decision dated 18 October 2019

[5]The decision issued by the Tribunal on 18 October 2019, dismissed the grievance of the Grievor and more particularly, made the following comments clear to the parties:

[2] Note draft terms of deed of settlement dated 1 February 2019.

[3] Such as where an Employer offered an employee lifelong tenancy or an employee has claimed adverse possession of title.

This is a case that should not have proceeded to arbitration. Particularly given that the Union were present at the investigation interview and were complicit in the decision taken by the Grievor that he not confront those who had brought the complaints against him. To fail to resolve this matter earlier, demonstrates a lack of objectivity on the part of those who have advised the Grievor to this point. Whilst the Tribunal will not make any costs orders against the Grievor on this occasion, there must come a point in time where Employers should rightfully be able to recover costs, in cases where matters are brought to arbitration either vexatiously or with no reasonable prospects of success and in cases where so much should have been clear to the representatives.

[6] The comments of the Tribunal should have been crystal clear to the Grievor that his case was regarded as very poor. Common sense should have told the Grievor and his representatives that it was now time to make good the earlier understanding of the parties, that in the absence of any appeal against that decision, he would relinquish any claim to the housing and vacate the premises. Unfortunately, the Tribunal did not refer to the requirement to vacate the premises in its decision and the offsetting of the remuneration benefit, in its decision. That should have been made clear and in part, the issuing of this supplementary decision, in the case where there is some controversy between the parties, should make the position as plain as day.

[7] What followed from the issuance of the decision on 18 October 2019, is ascertainable from the Tribunal record. Firstly, an Order of that same date was issued to the parties confirming the decision to dismiss the Grievance. Secondly, the Employer then sought to have the Tribunal issue the Orders that it had earlier intimated to the parties that it would, being that the Grievor should now vacate the premises and make good for the nominal rent of $500.00 a month, that was earmarked as the value of the benefit when calculated as part of the former employee's remuneration benefits.

[8]While the Tribunal was satisfied that the Order to vacate the employer's housing should be issued, despite not being specifically dealt with in the decision dated 18 October 2019, it was not willing to issue any order for the 'rental claw back' of the housing benefit, until such time as it had heard from the parties. At no stage, did the Tribunal regard itself as being functus officio due to its own oversight, but only now in a position where it was required to resolve the outstanding matters to give effect to its earlier decision. That is, there was an omission in the judgment and an application for orders by the Respondent Employer to give effect to the intention of the parties, following the directions issued on 10 June 2019. There is no apparent reason why the 'slip rule' should not be applied in such circumstances[4].

[9] In *Kumar v Prasad (trading as The Royale Wine Shop)*, this Tribunal stated: [2018] FJET 36; ERT JDS 09 of 2018 (3 December 2018)

The Slip Rule: Where Do We Look to Cure Error or Defects in Proceedings?

[25] In the case of a matter brought to the Employment Relations Tribunal, a Magistrate must exercise her or his jurisdiction having regard to Section 61B (2) of the Magistrates Court 1945 that requires

> *Subject to any rules and directions made by the Chief Justice under this Part, any magistrate exercising the jurisdiction and powers or performing any duties or*

[4] See for example, *Arnett v Holloway* [1960] VR 22

functions of any statutory tribunal subject to this Part, shall do so in accordance with the written law which established that statutory tribunal.

[26] Section 238 (2) of the Employment Relations Act 2007 provides that that where no provision within the Act is made for a particular circumstance, then the Magistrate Court Rules 1945 would apply to proceedings. In turn, Order III Rule 8 of the Magistrates Court Rules provides, that:

In the event there being no provision in the Rules to meet the circumstances arising in a particular cause, matter, case or event, the court and /or the clerk of the court and/or the parties shall be guided by any relevant provisions contained in the High Court Rules 1988.

[27] In relation to mistakes or errors arising from accident, slip or omissions, the guiding provision must be Order 20 Rule 10 of the High Court Rules 1988. Under the heading of Amendment of Judgment and Orders, the rule provides:

Clerical mistakes in judgments or orders, or errors arising therein from any accident, slip or omissions, may at any time be corrected on motion or summon without an appeal.

[10] The Tribunal is satisfied that the *High Court Rule* can be applied in this situation. It would also seem that there was nothing preventing the Tribunal from dealing with this informal application by the Employer, having regard to Section 234(1) (b) of the Act. Most importantly, like all matters in this jurisdiction, the matter was to be called back on, in order that all parties be given the opportunity to be heard[5] and that a fair disposal of the matter could take place.

[11]At today's hearing, Mr Maisamoa who claims to appear in this matter on behalf of the Grievor, despite there not being a change of solicitors filed, submits the Tribunal has no powers to make any orders that are not consistent with the decision dated 18 October 2019. The legal representative claimed that the Tribunal should not have issued any Order for the former employee to vacate the company housing, on the basis that the company had itself brought an application to have the Grievor evicted from the premises, in accordance with Section 169 of the *Land Transfer Act* 1971.

[12]This Tribunal disagrees with such a view and as Mr Tofinga had earlier intimated, he had no precise knowledge of such matters in any event. During today's proceedings, the Tribunal has referred Mr Maisamoa to the transcript of proceedings in this matter, that make very clear the basis by which the arbitrated hearing took place. It is simply unacceptable for a legal representative without any thorough knowledge of the history of a matter and without any knowledge of the undertakings and Directions issued to the parties as a precursor to trial on 10 June 2019, to now make the claim that the Tribunal is without power and the Grievor entitled to remain in the company property until such time as the High Court application by the employer has been disposed of by that court.

[5] The Tribunal has regarded the application by the Employer to correct the omissions arising out of the decision, as an application arising out of proceedings.

[13]More tellingly, is the fact that Mr Maisamoa stated on several occasions that he had no obligation to make the High Court aware of the outcome of these proceedings, nor the fact that the court should be given judicial notice of the Orders that have been issued by this Tribunal in the execution of its duties. The Tribunal also takes issue with the claim by Counsel that the Orders have not been sealed, when based on Section 227 of the Act, the documents conform with that statutory requirement. As Mr Maisamoa has been advised, his role as an officer of the court and legal professional is to ensure at all times, that any court that he appears before, is well armed with all relevant information.

[14]Whilst the Tribunal recognises that it should have made specific mention of the 10 June 2019 Directions Order within its decision, the fact simple is that it did not and was content to recall the parties, to attend to the administrative tasks of correcting the error, based on the application of the Employer. This Tribunal is satisfied that it can and should have the power to issue Orders to employees to vacate housing provided to them as part of an employment contract, when that contract comes to an end. Whether that power comes about under Sections 211(d), (e) or (h) of the Act, or a combination of those provisions is an issue that does not have to be expounded upon to give practical sense to what is being undertaken. A worker whose employment contract was summarily terminated on 20 September 2018 and who has not contested the substantive decision of this Tribunal regarding the justification of his dismissal, has no right to remain in the company housing, after a suitable period of notice has been provided to him to vacate that property, unless some overriding principle at law is at work. None of have been identified by Mr Maisamoa.

[15]This Tribunal has gone to significant lengths to ensure that the rights of employers are protected and safeguarded against vexatious conduct such as this. The representatives of the FSC have always before this Tribunal acted with good grace and measure, in a bid to ensure that the spirit and objectives of our employment law are protected. If there was any sensible reason why the Grievor should not now vacate the premises, the Tribunal would have been more than happy to entertain such an argument; the point is though, there is not. All that has occurred through this facilitated defiance, is that the Employer is still incurring costs associated with a justifiable employment decision, it had made some 16 months ago.

[16]On the basis that the Grievor has not vacated the premises, this Tribunal will now issue an Enforcement Order, requiring that it do so. This is an unfortunate next step in proceedings, as again all it does is cause the Employer additional costs. Mr Maisamoa has been put on notice, that the Employer would be well entitled to pursue costs against him and his client, if this matter continues in the Employment Court. Hopefully common sense will now prevail and the Grievor will do what he knows should have been done some time ago. Further, having heard from the parties in relation to issues of the claw back of the housing expense, it is the decision of this Tribunal that the Employer is entitled to recover from the Grievor the amount of $4000.00, being an estimated amount of the remuneration benefit provided in good faith, from June 2019 to February 2020. An Order to give effect to that clarifying decision will now be issued. The Grievor and his legal advisers cannot say that they had not been put on notice in this regard. That arrangement was made clear to everyone on 10 June 2019.

[17]The Tribunal regards Mr Maisamoa's conduct as contemptuous and completely at odds with the way in which practitioners should operate within this jurisdiction. It is unhelpful and will only have the end result of causing the Grievor to incur more costs as a consequence of his professional conduct. One wonders whether the Grievor truly believes that he should be remaining in the premises.

[18]As mentioned to Mr Maisamoa, he will be advised to alert any superior court to all of the matters pertaining to the history of this case, if he is to do what he says he will do and appeal the Orders and decision now issued.

Costs

[19]Finally, and in view of the conduct of Mr Maisamoa that he has done nothing other than further contribute to the unnecessary costs of the Employer[6], after consideration of the matter, the Tribunal intends to summarily impose a costs order against the Grievor in the amount of $1,000.00, to meet the costs of the Employer in attending to the matter today. While there does not appear to be any direct powers under the relevant laws at the present time, to order that the legal representative meet these costs personally[7], the Grievor should well understand the rationale for making this cost decision. If there had been that direct power, which the Tribunal believes there should be, then that would have been used on this occasion. For too long in this Tribunal, this Employer seems to have been subjected to reckless and baseless claims being made against it, in the hope that because of its size, somehow it will just capitulate to the approach. This cost decision seeks to do no more, than make parties accountable for maintaining baseless and reckless positions that have cost consequences. A separate Order for that purpose will also be issued.

Andrew J See
Resident Magistrate

[6] That is the Enforcement Orders for vacation should not have been required in this particular scenario.

[7] See for example Section 236 of the *Employment Relations Act* 2007 and Rule 10, Order 33 of the *Magistrates Court Rules* 1945.