

**IN THE EMPLOYMENT RELATIONS COURT**

**AT SUVA**

**ORIGINAL JURISDICTION**

**CASE NUMBER:** **ERCC NO. 8 OF 2013**

**BETWEEN:** **TPAF STAFF ASSOCIATION**

**APPLICANT**

**AND:** **FIJI NATIONAL UNIVERSITY**

**RESPONDENT**

**Appearances:** **Mr. Tokalauvere for the Applicant.**

**Ms. Rakai for the Respondent.**

**Date/Place of Judgment:** **Friday 09 January 2015.**

**Judgment of:** **The Hon. Justice Anjala Wati.**

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**JUDGMENT**

**Catchwords:**

***Employment - Substantive action in ERT – subsequently application file in ERC to stay proceedings of the disciplinary committee constituted under the HRP- the issue whether the HRP or the CA should apply is a matter for the ERT as the main cause is pending there- to file a stay application in the appellate jurisdiction without the matter being determined by the ERT is an abuse of the process of the Court.***

**Cases Referred To:**

***Dr. Uma Khurma and Dr. Jagjit Khurma v. The University of the South Pacific [Unreported] Employment Relations Court Case Number ERCC 12 and 13 of 2009.***

**Legislation:**

***The Employment Relations Promulgation 2007 (“ERP”).***

***The High Court Rules 1988 (“HCR”): Order 29 Rule 3; Order 41 Rules 7, 9 and 11.***

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### **The Cause**

1. The applicant seeks an order to stay all disciplinary proceedings before any disciplinary committee constituted under the Human Resources Policy ("**HRP**") until the Employment Relations Tribunal ("**ERT**") disposes the dispute on the HRP before it.
2. The applicant also wants the status quo to be maintained from 26 April 2013 being the date on which the Permanent Secretary accepted the dispute of the parties and also for an order that the employer ceases and desists from disturbing the status quo and /or victimizing the employees in any form or manner.
3. The third order sought is for the employer to revert to the Collective Agreement ("**CA**") for all new disciplinary matters until the ERT determines the status of the HRP contained in the employment dispute before it.
4. The application is professed to be made under ss.220 and 238 of the ERP and Order 29 of the HCR.

### **The Grounds in Support and Submissions**

5. The basis of the application is deposed through an affidavit of the General Secretary of the Union. He is also an employee of the respondent.
6. He states that:
  1. *He is the General Secretary of the Union since May 2010.*
  2. *On or about mid 2011 the Union entered into a dialogue with the management on the Unions Log of Claims ("**LOC**") 2010.*
  3. *The LOC negotiations was put aside by the employer and replaced by the employers concerns on the interpretation and implementation of the medical provisions of the CA which covered the members and their immediate families.*

4. *The management claimed that the medical provisions should not have included family members as beneficiaries under the scheme and that the Union should reimburse management on expenses incurred by the institution on family members for the last 10 years or so.*
5. *Instead of arguing with the management on interpretation of the provision in the CA, the Union filed a case in the ERT seeking an interpretation of the provision of the CA.*
6. *At the Tribunal, the employer assured that the status quo would be maintained but when the policy was due for payment, it was not renewed and the member's immediate family no longer enjoy the benefit.*
7. *Despite the existence of the CA, the management is in the practice of imposing conditions of the HRP, and when it suits the employer, the management applies the CA provisions.*
8. *Initially, the Union peacefully co-operated with the employer to iron out discrepancies through dialogue because it recognised the mammoth task management had in consolidating so many different schools under one roof. The management has taken this act of good faith as acquiescence to the unilaterally drafted HRP. The union was not consulted when the HRP was devised. The HRP directly impinges on the conditions of the members employment covered under the CA.*
9. *There is a pattern of behaviour by the employer. The members are being unduly punished for offences committed by others; there are unilateral decisions to transfer members from the TVET division to another, refusal to accord members their benefits under the CA like staff educational reimbursement and medical benefits and meting out punishment for actions that are not offences.*
10. *Even the General Secretary and the President are now facing the possibility of being terminated from the employment if found guilty on some allegations of misconduct.*

11. *It is feared that the disciplinary committee constituted under the HRP will conduct unfair proceedings. The General Secretary and the President have the fear for their job security and of another member who had informed them that he was told not to depend on the Union as the General Secretary and the President were going to be “sacked” soon. This was said even before the General Secretary and the President were even served with the allegation of misconduct. The member who had told them this has been found guilty by majority decision and he was told by the chairman of the committee to be represented for his mitigation because his job was “on the line”.*
12. *The main concern is the HRP on disciplinary matters and the manner in which the allegations of misconduct are being processed. The disciplinary committee is unfairly constituted. The management appoints 2 representatives and the disciplined employee appoints 1. The management has one representative from within the organisation and a lawyer of their own choice to chair the committee. The majority decision counts. The appointment of the chairperson should be done in consultation with the Union at the very least.*
13. *The Union subsequently reported an employment dispute to protect its members under the CA. The matters stated in the dispute are:*
  - *Victimization of Union officials and members.*
  - *Discrimination against Union members.*
  - *Harassing and undermining Union officials.*
  - *Unilateral imposition of the provisions of the HRP manual that does not harmonize with the CA.*
14. *Despite service of the dispute on the employer the management continues to invoke the HRC Policy unilaterally.*
15. *The granting of a stay protecting the status quo with effect from 26 April 2013 until such time ERT deals with the reported employment dispute should put on hold all*

*proceeding of the disciplinary committee constituted under the HRP and shall not adversely affect the employers operation and will not impact the employer financially.*

16. *The employees suspended and dismissed on or before 26 April 2013 remain suspended and dismissed and those at work remain at work until such time the ERT determines the matter.*
17. *The Union has always and still recognises the prerogative of management to manage its affairs including their right to discipline employees. If any new discipline case arises after 26 April 2013, the management may do so under the CA.*
7. In its argument, the applicant basically reiterated the contents of the affidavit and stated that the application before the ERC is for preservation of status quo and the ERT is going to deal with the substantive dispute. There is merit in the substantive matter. The applicant argues that it can ask for the status quo to be maintained through Order 29 of the HCR which is applicable by virtue of s. 238 (2) (b) of the ERP. The Court also has powers under s. 220(h), (i) of the ERP to hear the case.

**Employer's Response and Submissions.**

8. The HR Manager of the employer deposed an affidavit through which he avers that:
  1. *The form and nature of the proceedings before ERC is improper and not in accordance with the HCR.*
  2. *On 8 August 2013 the employer's solicitors wrote to the applicant to correct the procedure. This has not been done so the affidavit in support must be struck out in that paragraphs 1-21 are scandalous and not in compliance with the HCR.*

3. *The applicant has also not properly adduced the annexures and as such paragraphs 10-14 and 16-17 must be struck out for non compliance of the Rules.*
4. *The application to the Court is brought prematurely. There are two related matters before the ERT.*
  - i) *ERTMA 53 of 2011 between TPAFSA and TPAF on interpretation of clause 14 of the CA.*
  - ii) *ERT dispute 14 of 2013 between TPAFSA and FNU on alleged breaches of ss. 5.5; 6; 75, 141 and 143 of the ERP.*
5. *The respondent began communications with the applicant on the Unions LOC on 19 January 2011.*
6. *The issues being brought before this Court are going to be dealt in substance by the ERT. This proceeding is a duplication.*
7. *There is no CA in the affidavit in support. The respondent has always consulted the applicant regarding its HRP and its employee. Various emails were attached to the affidavit. It is deposed that these emails were circulated to the employees inclusive of the Union members for their views and comments on the HRP. The affidavit also contained the minutes of the meetings between the parties on the subject.*
8. *The General Secretary and the President are currently awaiting disciplinary decision on certain allegations. The matter is pending before the disciplinary committee.*
9. *There is no order against the employer from enforcing the HR Policy.*
  
9. *In addition to the affidavit evidence, the respondent argued that the process in ERC should have begun by an originating process and not a motion only.*

10. The applicant has chosen a forum, that is, ERT and it should stick to that forum. One cannot maintain status quo retrospectively from 26 April 2013.
11. The applicant has not shown whether there is a serious question to be tried, the balance of convenience: whom it favours; and the undertaking as to damages. It has not even disclosed the CA in the affidavit in support.

### ***The Law and Analysis***

12. The Union has filed two substantive matters before the ERT. The first is an employment dispute asking for compliance with ss. 5, 6, 75, 141 and 143 of the ERP. The dispute is over the CA in conjunction with the alleged non-harmonized provision of the HRP manual. The Union has claimed that the employer had victimized Union members and officials and that their actions are unlawful and discriminatory.
13. The second case is ERTMA 53 of 2011 asking for the ERT to interpret clause 14 of the CA between TPAFSA and TPAF.
14. The Union now is asking the Court to stay the proceeding of the disciplinary committee formed under the HRP which committee is said to be unfairly constituted and that all disciplinary proceedings should be governed by the CA.
15. Firstly the substantive dispute on whether the CA or the HRP applies is subject to an existing proceeding before the ERT. Therefore any interlocutory order such as stay of action or proceedings under HRP and implementation of CA provisions must be filed in the ERT.
16. It is an abuse of the process to file an interlocutory application in the ERC when the substantive issue is pending in the ERT.

17. Additionally, the ERC does not have jurisdiction and powers to grant stay of disciplinary proceedings constituted under the HRP because it does not have the substantive cause before it. Mr. Tokalauvere says that this can come under Order 29 of the HCR.
18. To use Order 29, one has to have a substantive cause at same point in time but this will be not be possible because the substantive cause is still pending in the ERT: **Order 29 Rule (3) of the HCR.**
19. If I am asked to stay the disciplinary committee proceedings and order that matters be dealt with under CA then I will have to make a finding on the applicably of the CA and the HR Policy. That in effect will make the ERT proceedings redundant.
20. Further, any order to continue or discontinue the proceedings under the CA and the HRP respectively is to fast tract the dispute and in effect will be an order for compliance of a contract which specific powers I do not have until I have a proper case founded on an employment contract before this court: **Dr. Uma Khurma and Dr. Jagjit Khurma v. The University of the South Pacific [Unreported] Employment Relations Court Case Number ERCC 12 and 13 of 2009.**
21. This now leads me to comment on the affidavit in support of the application. This affidavit has a lot of annexures but there is no reference in the affidavit itself what the annexures are and for what purpose it is made. The affidavit contravenes Order 41 Rules 7, 9, and 11 of the HCR.
22. No leave has been sought to adduce the defective affidavit. As such the affidavit cannot be safely used in the proceedings.



**Final Orders**

23. The application is struck out for being an abuse of the process of the Court and for want of jurisdiction too.
24. I order costs against the applicant in the sum of \$1500.



*Anjala Wati*

**Anjala Wati**

**Judge**

**09.01.2015**

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**To:**

1. **Mr. Tokalauvere for the Applicant.**
2. **Ms. Rakai for the Respondent.**
3. **File: ERCC No.8 of 2013.**