IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

ORIGINAL JURISDICTION

CASE NUMBER:	**ERCA 12 of 2018**
BETWEEN:	**FIJI TEACHERS UNION**
	PLAINTIFF
AND:	**THE MINISTRY OF EDUCATION, HERITAGE AND ARTS**
	RESPONDENT
Appearances:	*Mr. D. Nair for the Plaintiff.*
	Ms. B.Narayan, Ms. O. Solimailagi and Ms. Ali for the Defendants.
Date/Place of Judgment:	*Tuesday 11 September 2018 at Suva.*
Coram:	*Hon. Madam Justice A. Wati.*

A. *Catchwords:*

Employment Law – Claim against Ministry of Education, Heritage and Arts which is included as an Essential Service and Industry within the meaning of the term - Whether the claim constitutes a trade dispute within the meaning of s. 185 of the ERA – When did the employment grievance between the parties first arise – Whether the employment grievance is time barred in that it was not lodged within 21 days when it first arose – whether the right to maintain an action on a contract for renewal can be maintained when the same has been superseded by a new contract under the reform undertaken by the Government.

B. *References:*

(i). *Legislation*

1. *The Employment Relations Promulgation Act 2007 ("ERA"): ss.185; 188.*

(ii). Cases

1. *Polokwane Local Municipality v. South African Local Government, Bargaining Council, AM Carrim, N.O. and MS SC De Villiers, South African Judicial Review Case Number 1843/05.*

Cause

1. The defendant has applied for the action brought by the plaintiff by way of an originating summons to be struck out on the grounds that:

   (a) The cause of action relates to a trade dispute that exceeds the jurisdiction of the Employment Relations Court ("ERC") under s. 188(1) of the ERA;

   (b) Alternatively, the action is time barred under s. 188(4) of the ERA;

   (c) The claim does not disclose a reasonable cause of action; and

   (d) It is otherwise an abuse of the process of the court.

2. The plaintiff's originating summons seeks the following relief:

   (a) A declaration that the defendant ("Ministry") has contravened the employment contract of the members of the plaintiff ("FTU") by not renewing their existing contracts as Head of Small, Medium and Large Primary and Secondary Schools;

   (b) A declaration that the Ministry has contravened Part 9 s. 77(1) (a) of the ERA;

   (c) A declaration that the Ministry acted contrary to the legitimate expectation of the members of the FTU and that its actions are unjustified, discriminatory and in breach of the principles of fair labour practices; and

(d) ***An order that the Ministry renews the contract of the FTU members as heads of the schools in the positions they were in prior to their positions being downgraded.***

Background.

3. I will identify the background facts leading to the issues between the parties as deposed in the affidavits. The FTU has school teachers as its members who are employed by the Ministry in various schools in different capacities. The action is brought on behalf of its members who had been employed in the substantive positions as the heads of schools pursuant to an employment contract before the civil service reform by the Government in 2016.

4. Prior to the civil service reform, these members had their contracts of employment with the Ministry which provided for renewal of their contract, conditional upon satisfactory performance. As an example, the contract of one Mr. Satya Prakashan was referred to.

5. Between March and November 2016, the Government of Fiji carried out the reform in the civil sector ***("Civil Service Reform")***. This reform came about as result of the recommendation in the report from the World Bank. The defendant Ministry came under the reform too. Part of the reform process was to modernize the civil service salary structure.

6. The modernization of the salary structure included the broad banding of positions and benchmarking the same against the private sector to decrease administration, streamline salaries and provide attractive and competitive salaries.

7. Prior to the reform, the positions within the civil service, including the Ministry, were based on 57 different salary scales out of which 26 salary scales applied to the teaching positions.

8. Due to the reform, the government, in January 2017, implemented the *Job Evaluation and Civil Service Remuneration Setting Guidelines* ***("Job Evaluation Exercise: the JEE")*** to assist the Permanent Secretaries of each government ministry to define the new positions and the salary band assigned to these positions. The review of the remuneration was based on the requirements of the position as defined in the job description and not on the personal attributes of any employee.

9. According to the defendant, after the job evaluation exercise, all job holders could request for a review of the level of the job and could demonstrate that the job has substantially changed or that the level of the job is not comparable to a similar job in that or another Ministry. The defendant avers that there was no request for review of the heads of schools positions from any of the job holders prior to the transition period. It is also contended that school based officers were invited to be trained to evaluate jobs during the reform.

10. The defendant further contends that the plaintiff was consulted about the reform and the JEE. It is deposed that the plaintiff attended the meetings in 2017 on 8 June, 17 July, 8 August and 30 November.

11. As a result of the reform, 15 salary bands were introduced in the levels A to O: A being the lowest level and O the highest. To facilitate the transition of civil servants old positions and salary scales to the new positions and salary scales, the government also implemented the *Job Evaluation Transition Procedures* to ensure consistency across the civil service.

12. The transition of the civil servant positions including the teachers provided for an increase of no more than 15% of their salaries under their existing substantive positions. Civil servants whose new salary matched the salary band for the positions they held were automatically moved to the corresponding new substantive positions with the applicable salary band. For those civil servants whose salary did not match the salary band of their existing positions were redeployed in accordance with the Job Evaluation Transition Procedures.

13. Specifically, the Head Teachers positions were evaluated and reclassified to the new positions of Head Teacher Large, Head Teacher Medium and Head Teacher Small. The threshold for the Head Teacher Large position was for schools with more than 25 teachers and that was based on the salary band "J". The position for Head Teacher Medium was for schools that had between 8 to 24 teachers and based on Salary Band "I". The position for Head Teacher Small was for schools that had 1 to 7 teachers and based on salary band "H" with no assistant head teachers.

14. Similarly, the Principals positions were evaluated and reclassified to the new positions of Principal Large, Principal Medium and Principal Small. The position of Principal Large was for schools with more than 50 teachers and based on salary band "L". The position for Principal Medium was for schools having teachers between 26 and 50 on salary band "K" and the position for Principal Small was for schools which had up to 25 teachers and based on salary band "J". A school with Principal Small had no Vice Principal.

15. There was a transitional period for the implementation of the reform. In August 2017 the Ministry transitioned all teachers including Heads of Schools to the new positions and corresponding salary bands in accordance with the Job Evaluation Transition Procedures. All the teachers under the Ministry including Heads of Schools were issued new contracts.

16. During the transition period, the teachers who were Heads of Schools whose salary matched the new Head of School positions were automatically moved to the corresponding new position with the applicable salary band. For those Heads of Schools whose salary did not match the salary band of their existing positions were redeployed in accordance with the Job Evaluation Transition Procedures. The new positions of the Heads of Schools were declared vacant and advertised.

17. For those who were moved to the corresponding new positions were offered new contracts. Those who had not moved were offered the appropriate increase of 15% salary and re-

deployed to smaller school as Head Teachers or Principals, Assistant Head Teachers, Vice Principals, Assistant Principals, Heads of Department or teachers with a new contract for the duration of the balance term of their previous contracts.

18. The holders of Assistant Head teachers and Assistant Principal Positions who were based in schools with a vacant position for a Head Teacher or Principal were offered acting appointments.

19. Between November 2017 and February 2018, The Ministry advertised the vacant positions for heads of schools in accordance with the government's *Open Merit Based Recruitment and Selection Guideline*. Most of the teachers acting in the positions had applied and the majority of them were not successful as they did not meet the threshold scores of the selection panel. They were advised of the results.

20. Some teachers were successful and they were appointed as the respective heads. For the majority of the large schools, the applicants did not meet the threshold requirements and the acting appointments continue. The positions are to be advertised later this year.

21. It is the plaintiff's contention that its members who had been appointed to substantive positions pre the civil service reform are now being informed that they do not qualify for the same posts. The plaintiff says that the Ministry had indicated to it in writing that renewal of their contracts was automatic provided there was no performance issue.

22. The plaintiff's say that after the civil service reform, some substantive post holders have been downgraded although the salary had been re-graded and increased. It is contended that if the position was not downgraded, the members would have received the salary of the new substantive positions which they legitimately expected and had been deprived of.

23. The plaintiff contends that before the restructuring and the reform, its members had performed their jobs in the same position. After the restructure they acted in the said

positions which shows their ability to perform the task and by not renewing the contracts for the substantive posts, the members have been subject to unfair and discriminatory practices by the Ministry. It is against this background and contention that the claim is brought.

Issues

24. On the application for striking out, the issues that this court needs to determine are:

1. ***Whether the claim before the court amounts to a trade dispute thus outside the jurisdiction of the ERC to determine?***

2. ***If the claim constitutes an employment grievance within the meaning of the term, was the same lodged within time over which the court can preside and determine?***

3. ***Does the claim disclose a reasonable cause of action or is it otherwise an abuse of the process of the court?***

Law and Analysis

25. The first issue raised by the defendant is that the claim brought by the FTU constitutes a trade dispute and the ERC does not have jurisdiction to hear and determine trade disputes concerning an essential service and industry. The defendant relies on s. 188(2) of the ERA. For the issue to be resolved, I need to examine s. 188 (1) and the definition of the terms *employment grievance* and *trade dispute.*

26. It is not disputed by the plaintiff that the Ministry is defined as an essential service and industry under s. 185 of the ERA which states that the government and the statutory authority is included in the definition of essential service and industry. The Ministry of Education, Heritage and Arts is a government ministry controlled and managed by the government and as such it is covered under Part 19 of the ERA. Part 19 deals with matters relating to essential services and industries.

27. Further, it is the decision of the government arising out of the civil service reform that the plaintiff is essentially seeking to challenge as the plaintiff does not want its members to have the new contract but to have the old contract prior to the reform renewed. The new contracts came about as a result of the reform. The Government is defined as an essential service industry under s. 185 of the ERA.

28. S. 188 reads:

Jurisdiction over trade disputes and employment grievances

188 (1) "All trade disputes in essential services and industries shall be dealt with by the Arbitration Court in accordance with this Part.

(2) The Employment Relations Tribunal and the Employment Relations Court established under Part 20 shall not have any jurisdiction with respect to trade disputes in essential services and industries.

(3) For the avoidance of doubt, Part 20 shall not apply to essential services and industries, except as provided under subsection (4).

(4) Any employment grievance between a worker and an employer in essential services and industries that is not a trade dispute shall be dealt with in accordance with parts 13 and 20, provided however that any such employment grievance must be lodged or filed within 21 days from the date when the employment grievance first arose, and-

(a) where such an employment grievance is lodged or filed by a worker in an essential service and industry, then that shall constitute an absolute bar to any claim, challenge or proceeding in any other court, tribunal or commission; and

(b) ***where a worker in an essential service or industry makes or lodges any claim, challenge or proceeding in any other court, tribunal or commission, then no employment grievance on the same matter can be lodged by that worker under this Act".***

29. The above section makes it clear that the ERC can only hear employment grievances between a worker and an employer in essential services and industries. The ERC does not have jurisdiction to hear trade disputes between a worker and an employer in an essential service and industry.

30. What constitutes an employment grievance and what a trade dispute needs to be clearly looked at. The definitions are provided under s. 185 of the Act. An employment grievance ***means a grievance involving dispute of rights including the following matters –***

(a) dismissal or termination of any worker;

(b) discrimination within the terms of Part 9;

(c) duress in relation to membership or non-membership of a union;

(d) sexual harassment in the workplace within the terms of section 76; or

(e) worker's employment, or one or more conditions of it, is or are affected to the worker's disadvantage by some unjustifiable action by the employer.

but shall not include any dispute of interest.

31. A trade dispute means *a dispute as to disputes of interest which includes a threatened, impending or probable dispute.* A dispute of interest is defined as *matters or disputes arising between employers and trade unions out of collective bargaining and pertaining to the relations of employers and workers which are connected with the employment or non- employment or the terms of*

employment, or the conditions of work of any person, but shall not include matters concerning dispute of rights.

32. The issue before me is the plaintiff's application to have the contract of its members before the civil service reform renewed and their positions as heads of departments given back to them. The dispute therefore arises as a result of the civil service reform which the plaintiff asserts has affected its members term and conditions of the employment. The civil service reform did not arise as a result of the collective bargaining between the government and the FTU. It arose as a result of its initiative for a reform. The reform initiative arose after the recommendations from the World Bank to modernize the salary structure for the civil service sector. This is very clear from the defendant's own affidavit in paragraph 4 which I cite in full:

"Between the period from March 2016 to November 2016, as part of the Fijian Government's civil service reforms which included the Ministry, the Fijian Government agreed on recommendations from the World Bank reports to modernize the salary structure for the civil service. The modernization of salary scales included the broad banding od positions and benchmarking to the private sector to decrease administration, streamline salary management and provide attractive and competitive salaries across the civil service".

33. If the issue arose as a result of the collective bargaining then the matter would be classified as a trade dispute and not an employment grievance. The pertinent words in the definition of the term trade dispute are ***"matters or dispute arising out of collective bargaining..."***. Ms. Narayan did not pay any emphasis to these words and referred me to a South African case of ***Polokwane Local Municipality v. South African Local Government, Bargaining Council, AM Carrim, N.O. and MS SC De Villiers, Judicial Review 1843/05*** in which *Molahlehi, J* in attempting to deal with the distinction between dispute of rights and dispute of interests relied on ***Rycroft and Jordan in A Guide to SA Labour Law (1992) pg. 169.*** The distinction was made in the following manner:

"Broadly speaking, disputes of right concern the infringement, application or interpretation of existing rights embodied in a contract of employment, collective agreement or statute, while disputes of interest (economic disputes) concern the creation of fresh rights, such as higher wages, modification of existing collective agreements etc. Collective bargaining, mediation and, as a last resort, peaceful industrial action, are generally regarded as the most appropriate avenues for the settlement of conflicts of interests while adjudication is normally regarded as an appropriate method of reserving disputes of rights."

34. I must say that Ms. Narayan has not shown to me that South Africa's legislative definition uses the same words or words to the same effect which I have marked as pertinent words in the definition of the term trade dispute. I therefore find that the definition cannot be viewed and applied independently of the definition provided by the ERA.

35. It maybe that the plaintiff Union was consulted and informed about the reform but it is very clear that the civil service reform was not as a result of the collective bargaining. There was no negotiation and discussion with a view to reaching/reviewing any form of a collective agreement between the government and the plaintiff. The definition of collective bargaining is ***"treating and negotiating with a view to concluding a collective agreement or reviewing or renewing such agreement": s. 185 of the ERA.*** The bringing of the action by the Union does not mean that the claim becomes a trade dispute. It has to meet the definition of the term.

36. The plaintiff is claiming that the civil service reform has affected the rights of its members for a renewal of their contract which existed prior to the civil service reform and they seek a declaration to that effect. The plaintiff says that the act of the Ministry is discriminatory in that the Ministry has refused to employ its members in the positions they were contracted for although those positions are available. In essence the plaintiff's claim falls under the

definition of the employment grievance. I therefore find that the court has jurisdiction to hear the matter filed before it.

37. The next issue for determination is the time limitation. It is the defendant's contention that after the civil service reform, the employees of the Ministry had all received a new contract in August 2017 and if the plaintiff was aggrieved, it ought to have lodged or filed the grievance within 21 days from the respective dates on which each member had entered into a new contract. It is asserted that the plaintiff is now out of time by almost 8 months in lodging or filing the grievance.

38. It is not disputed that after the civil service reform, some members of the FTU who occupied the heads of school position were not automatically given heads of school positions but instead given new contracts for various positions for example as assistant head teachers or vice principals and they continued to act in the positions of the heads of school until the substantive post was advertised and properly filled or is yet to be advertised and filled.

39. In May 2018, some members who are in the acting positions were interviewed under the open merit based requirement scheme and told that they did not qualify for the position of the heads of school. That then gave rise to this claim which was filed in May 2018.

40. Mr. Nair argues that the time should run from May 2018 when the members were told after the interview that they did not qualify for the positions of the heads of school. He contends that the time does not start running from August 2018 when the members received new contracts for the re-graded positions.

41. I do not agree with Mr. Nair that the grievance first arose when the members went for an interview and were told that they do not qualify for the position. In fact after the civil service reform exercise and the re-grading of positions and salaries, the members had entered into new contracts of employment in August 2017. There is evidence of this as one Mr. Satya Prakashan had signed his contract in August 2017.

42. It was therefore in August 2017 when they formally knew and realized that their positions have been re-graded and that they were no longer holding the positions of heads of school. It is therefore very clear that any such grievance first arose in August 2017 and not May 2018.

43. By May 2018, the members were interviewed on an open merit based recruitment scheme and refused the positions. The open merit based recruitment scheme only confirmed the initial re-grading of the members position upon which they had received new contracts. This is not the time when the grievance first arose. The words ***"first arose"*** are the key words in s. 184 of the ERA which I find are ignored by the plaintiff.

44. The members of the plaintiff cannot claim a right on the substantive position because they acted on the same after the civil service reform. There is no automatic right to a substantive position because of that. The right of the substantive position was taken away in August 2017 and any claim ought to have been filed within 21 days from August 2017. I find that the claim by the plaintiff is barred under s. 188(4) of the ERA and has to be struck out.

45. On my findings that this action is time barred, I do not consider it proper to deal with the issue of whether the plaintiff's claim discloses a reasonable cause of action or is otherwise an abuse of the process of the court. Venturing into that exercise would amount to analyzing the strength of the claim and its chances of success as Ms. Narayan's arguments were centered on the prospects of success in challenging that the members ought to be renewed their old contracts when they have already entered into new ones.

Final Orders

46. In the final analysis I find that the plaintiff's claim is time barred under s. 188(4) of the ERA in that the grievance was not filed within 21 days from the time it first arose.

47. I therefore dismiss the plaintiff's claim and order it to pay costs of the defendant which I summarily assess in the sum of $2000. The costs are to be paid within 14 days from the date of the judgment.

Anjala Wati

Judge

11. 09.2018

To:

1. *Mr. D. Nair for the Plaintiff.*
2. *AG's Chambers for the Defendant.*
3. *File: Suva ERCC 12 of 2018.*