

IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

ORIGINAL JURISDICTION

CASE NUMBER: ERCC 09 OF 2018

BETWEEN: **RAJESH NARAYAN**

APPLICANT

AND: **LAND TRANSPORT AUTHORITY**

RESPONDENT

Appearances: Mr. D. Nair for the Applicant.

Ms. E. Dauvere for the Respondent.

Date/Place of Judgment: Tuesday 28 January 2020 at Suva.

Coram: Hon. Madam Justice Anjala Wati.

A. *Catchwords:*

EMPLOYMENT LAW – *provisional offer of employment – employer required certain conditions to be met which would preclude any conflict of interest of the worker with his work – the pre-requisites not met by the worker – employer entitled to terminate the offer and not provide work to the employee.*

Cause and Background

1. The employee has filed an originating summons seeking the following orders:

- a. A declaration that the employer has breached the employment contract of the employee as driving examiner when it failed to perform its obligations under the terms of the contract.*
 - b. A declaration that the employer acted contrary to the legitimate expectation of the employee and its failure to inform the employee of his employment status is unjustified, discriminatory and in breach of fair labour practices.*
 - c. An order for specific performance of the employment contract and for the employer to pay the employee his wages from 12 March 2018 under s. 24 of the ERA.*
2. It has been agreed by the parties for the Court to only the application on the first two reliefs and for the issue of damages to be determined later shall it come to that stage as there may be a need for oral evidence on the question of the proper remedy that ought to be granted.
3. The employer has also filed a striking out application mainly on the grounds that the allegations of the employee cannot be substantiated with any evidence. It is also averred that the deposition of the employee is scandalous and oppressive.
4. I find the striking out application to be baseless. Affidavit evidence is evidence in written form. Given the affidavit evidence, one cannot assert lack of evidence. True indeed, it may not be worth the weight that one expects or does not expect to be attached to it. That is a matter for the Court.
5. Simply put, if the employee has deposed an affidavit; that becomes his evidence. The question will be that of probative value of the evidence which is material in determining the substantive cause. The matter cannot be struck out on the basis of lack of evidence. I also do not find that the affidavit evidence in any part is scandalous or oppressive.

The Position of the Employee

6. The employee had deposed an affidavit through which he identified how he entered into an employment contract with the employer. He says that he was operating a driving school under the business name of Total Driver Management since 2010 from 88 Jerusalem Road, Nabua, Suva.
7. In October 2017, he applied for the advertised position of a Driving Examiner with the Land Transport Authority at their Valelevu Office. After being shortlisted for the position, he was invited for an interview along with other candidates.
8. After giving his interview, he was offered the employment contract which he accepted. He says he started work on 12 March 2018 as agreed by the parties.
9. It is his position that he was informed by one Ruci Mainewa from Human Resources section to surrender his driving school business registration certificate as it would be in conflict of interest if he continued to operate the same whilst he held the position of a Driving Examiner.
10. The employee says that he surrendered his driving school business registration certificate and also deregistered the driving school business in anticipation of taking up the position of the driving examiner.
11. On 12 March 2018, he says he reported for duties. At about 12pm, he was orally informed by one Matila Cama from the Human Resources Department to leave the premises and that he will be contacted later.
12. He says that on 4 April 2018 he wrote to the Land Transport Authority to follow up on his appointment and on the issues raised by the Human Resources Officer Ms. Cama. He has not received any response.
13. It is his position that the employment contract is valid, legally binding and enforceable and that the employer has breached the same when he was verbally asked to leave his work premises.

14. The employee therefore seeks loss of wages from 12 March 2018 for a period of 3 years and also damages for humiliation, loss of dignity and injury to his feelings. He asserts that it got publicly known that he has been appointed as the driving examiner and with the new development he has suffered mentally and was traumatized.

The Employer's Position

15. The employer also deposed through an affidavit on why the employee was not provided with work after the offer letter was duly signed by both the parties.
16. The employer admits that the employee was offered the position of the Driving Examiner to commence work on 12 March 2018. The letter of offer was dated 1 March 2018.
17. According to the employer, he was advised by the team to surrender his driving school business registration certificate, de-register his driving school, and surrender his driving instructors permit number 43/2000 since it was going to conflict with his work as the employee of Land Transport Authority.
18. The employer says that the employee did surrender his driving school business registration certificate but had failed to de-register the driving school business and to surrender his driving instructors permit.
19. The employer says that subsequently, on or about 4 March 2018, the employee wrote to one Nikhil's Driving School stating that he would like to join Nikhil's Driving School as a Driving Instructor.
20. On 19 March 2018, an internal audit report on the recruitment of Driving Examiners was done by the employer's Internal Audit Team and submitted to the Board. The report found that the employee had a driving school. It was also reported that even though the employee was willing to close down his driving school, the nature of his business and the relationship with the past customers may still pose a conflict of interest and potential risk of favoritism.

21. On 24 April 2018, the employer says it wrote to the employee notifying him that the post will be re-advertised and that he may re-apply for the same.
22. On 4 May 2018, one Umesh Chand of Nikhil's Driving School wrote to the employer and informed that Mr. Rajesh Narayan is an additional Driving Instructor in the School.
23. It is the employer's view that the employee acted fraudulently in trying to be employed with the Land Transport Authority and with Nikhil's Driving School at the same time without informing and notifying the Land Transport Authority. It would therefore be oppressive if the orders sought by the employee were to be granted.

Issues and Analysis

24. The employer has taken two positions. The first is that the offer letter is not a contract of employment and is a temporary offer which was subject to the pre-requisites being complied with such as police clearance and other matters. Once the pre-requisites were complied with, a contract would have been prepared and the employee would then start work. The employer states that there is no evidence of the fact that the employee in fact started work on 12 March 2018.
25. The employer says that the employee had to fulfill some of the pre-requisites and the ones that needed compliance was that he should:
 - (i) *surrender the driving school business certificate;*
 - (ii) *de-register the driving school business; and*
 - (iii) *de-register his driving instructors permit.*
26. The second position that the employer has taken is that employee acted in a manner which created conflict of interest with his position when he wrote to Nikhil's Driving School on 4 March 2018 and asked to be a driving instructor at his school. This led to the employer to find that the he was not a suitable person for the vacancy that was advertised.
27. I will deal with each allegation raised by the employer in turn.

A. The Offer Letter and the Failure to Fulfill the Conditions of the Offer Letter

28. I agree with the Land Transport Authority that the offer letter was a provisional offer and that a proper contract was subject to certain pre-requisites being met. That is the procedure that most employers adapt. There is nothing sinister about that.

29. The pre-requisites in this case which is the subject of contention is the failure to fulfill the conditions of the offer letter.

30. I have perused the offer letter which was accepted by the employee on 12 March 2018. Under the head "*Employment Conditions*" it is written "*As per Human Resources Policy*".

31. The policy has not been attached to the affidavit or the conditions shown to me in any other way. Be that as it may, the employee does not refute that he had to surrender his driving school business certificate and de-register the driving school business. What he contends is that he did not need to de-register his driving instructors permit.

32. I will therefore deal with each pre-requisite in turn. The first is to surrender the driving school business certificate. The employee says that he did surrender his driving school certificate. In one affidavit he refers to his letter of 1 March 2018 to the Human Resources Manager of the Land Transport Authority.

33. The letter reads:

"I Rajesh Narayan owner of Total Driver Management would like to surrender my Driving School permit effective from 12 March 2018 since I have accepted the post of Driving Examiner at LTA.

Also would like to declare that I do not hold any PSV permit under my name.

I look forward for your consideration."

34. The second letter is to the Team Leader - Driver Testing. The letter is dated 8 March 2018. The letter reads:

"I Rajesh Narayan of Total Driver management would like to surrender my Driving School Certificate since I have been offered employment at LTA from 12 March 2018.

Please find original copy of my Driving school certificate.

I look forward for your consideration".

35. In its initial response to the employee's contention that he surrendered the driving school registration certificate, the employer agreed that he did so. This admission is made in paragraph 7 of the affidavit in opposition filed on 14 August 2018 and reads as follows:

"The Plaintiff only surrender the driving School Certificate but did not deregister the same".

36. The employer also admits this in paragraph 8 of its affidavit filed on 06 August 2018. This affidavit was filed in support of the application to strike out the originating summons. The admission reads as follows:

"That the Plaintiff did surrender his Driving School Registration Certificate but had failed to de-register it and his Driving Instructor Permit".

37. Despite its admission under oath, Ms. Dauvere submitted that the employee has not proved that he has submitted and surrendered the driving school business certificate and that there is no evidence that the letters were received by the Land Transport Authority. I find this submission alarming.

38. There is in fact no need to provide evidence of matters which have been admitted by the other party under oath. I therefore cannot have regard to Ms. Dauvere's submissions which is not supported by the employer's affidavit.

39. I accept that the employee had complied with this pre-requisite to surrender the driving school business certificate. The next question is whether the next pre-requisite of de-registering the driving school business was attended to by the employee.
40. The employee says that he had revoked the registration of his two vehicle which operated under the driving school. The vehicles were IH 911 and HC 588.
41. The employee provided documentary evidence from the records kept at and by the Land Transport Authority. The evidence is clear that the vehicle HC 588 which was a driving school vehicle was disposed on 9 March 2018 to one Umesh Chand. The other vehicle IH 911 was converted as a private vehicle on 09 March 2018.
42. There is no dispute that the two vehicles that were used in the Driving School were no longer operating as the driving school vehicles. However the issue is whether the driving school had been de-registered or was it still a valid business?
43. The Land Transport Authority has submitted a certificate of registration which shows that the employee's driving school business registration was valid from 21 May 2013 to 21 May 2018. There is no evidence that the driving school had been de-registered. If the school was de-registered then there should be a certificate to that effect otherwise the initial certificate will be in force until 21 May 2018. In light of a valid driving school business in existence, the employee could not be employed because of the obvious conflict of interest.
44. The employee has shown evidence that he has surrendered his driving school business certificate. He says that once he returns the driving school permit and/or the certificate, it is deemed revoked and de-registered.
45. The records kept by the Land Transport Authority shows that the certificate of registration is still valid. I do not find that returning the certificate of registration is sufficient. The business needed to be de-registered from the system and the information at the Land Transport Authority updated so that the employee does not use his existing business for financial gain. It

is my view that it was for the employee to meet this requirement and he failed in complying with the same.

46. The third pre-requisite that the employer complains has not been fulfilled is the de-registration of the driving instructors permit. The employee says that he was not told to de-register his driving instructors permit. He says that that is the qualifying requirement for the position of the driving examiner.
47. It is correct that there is no evidence that the employer had required the employee to de-register the driving instructors permit. It is also correct that the driving instructors permit certificate holder would be a preferred choice for the position of the Driving Examiner. However, the employee cannot convince me that he did not know that he could not hold the driving instructors permit in one hand and occupy the position of the driving examiner on the other.
48. There is a clear conflict of interest in this regard. As a driving examiner, a person can always improperly or fraudulently allow a person to qualify for a driving licence. These people could be the same people who have been taught driving privately by the person using his driving instructors permit.
49. It does not make sense to me when the employee says that he did not know that he was to de-register his driving instructors permit. Why else was he asked to surrender and de-register his driving school? It was so that he cannot gain pecuniary interest using his position as a driving examiner. The driving instructors permit is connected to the driving school. If the applicant cannot use the driving school certificate, he cannot use the driving instructors permit either. How can the employee be so naïve in asserting that he was not asked to de-register the driving instructors permit?
50. I find that the driving instructors permit ought to have been de-registered together with the driving school so that the employee could not use the permit privately to attract clients for monetary benefit.

51. I therefore find that the pre-requisite was known or ought to have been known by the employee and not met. I therefore do not find that the conditions of the offer had been fulfilled for the employee to require the respondent to provide him with work under the offer letter.

52. I will now turn to the next issue which is:

B. Conflict of Interest

53. The employer has attached a letter to its affidavit dated 4 March 2018. The letter reads as follows:

“I Rajesh Narayan DIP Number DI 43/2000 would like to join your driving school as additional Driving instructor with your company.

I have wide experience in driving school since I was giving tuition in driving school from year 2005.

I look forward for your approval”.

54. The employee does not deny writing that letter but says that there is a typographical error in the date. The letter was written on 4 May 2018 and delivered to Nikhil’s Driving School on the same day. He enclosed a copy which indicates that the same was received by one Umesh Chand on 4 May 2018 at 9am.

55. The employee says that he needed to earn for a living and when he was told to go home verbally, he then applied to Nikhil’s Driving School to be an instructor.

56. Nikhil’s Driving School had written to the Land Transport Authority on 04 May 2018 informing that the Rajesh Narayan will be an additional instructor in his company.

57. Since there is a huge concern surrounding the employer’s allegation that the employee had been acting fraudulently in applying to be a driving instructor whilst being offered employment

with the Land Transport Authority, it was incumbent on the employee to show sworn evidence from one Umesh Narayan that he only received the application in May.

58. I cannot overlook the fact that the employee had asked in the originating summons for wages for 3 years when he actually found work in May 2018, just within 2 months from that date he said he resumed work at the Land Transport. Whether he started work or not is a matter that cannot be established on the affidavit evidence. Both parties have taken contrary positions.
59. The employee ought to have at least disclosed in his initial affidavit that he had written to Nikhil's Driving School and found work in May 2018. This was only addressed by him when the employer raised the issue of conflict of interest. It is not proper for damages for 3 years lost wages to be claimed as the employee had found work.
60. This makes the evidence of the employee shaky when it comes to the question of the authenticity of the date of the letter to Nikhil's Driving School.
61. I also cannot overlook the fact that the employee has disposed his vehicle to the same Umesh Chand of Nikhil's Driving School. Whether this was pre-planned to operate a side business or a genuine transaction so that the employee could continue his employment with the defendant company should be a matter that he ought to have addressed with due diligence in his affidavit in light of the allegation of conflict of interest. There is also suspicion surrounding this transaction.
62. Given the fact that the driving school was not de-registered, the driving instructing permit of the employee intact and the letter of 4 March 2018 (which is alleged to be written on 4 May 2018), creating conflict of interest, I come to the finding that the employer was entitled to form an opinion that the employee has not clearly de-established his ties with his driving school and that his position would conflict with that of his employment as a result of which the provisional offer letter could not be finalized.
63. On the affidavit evidence before me I cannot find that the employee is entitled to the declaratory orders sought by him.

Final Orders

64. In the final analysis, I dismiss the employee's claim for unlawful and unfair dismissal. I will order each party to bear their own costs as the employer is also not successful in its application for striking out for the reasons I have identified in the earlier parts of the judgment.
65. The parties had agreed that the finding in this matter will apply in the case of *Ajesh Kumar v. Land Transport Authority – Suva ERCC 08 of 2018*. I will give the parties an opportunity to address me on this after reading the judgment.



Hon. Madam Justice Anjala Wati

Judge – High Court Suva

28.01. 2020

To:

1. *LTA Legal Department for the Applicant.*
2. *Mr. D. Nair for the Respondent.*
3. *ERCC 09 of 2018.*