

IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

APPELLATE JURISDICTION

CASE NUMBER:

ERCA 02 of 2016

BETWEEN:

SATISH CHAND

APPLICANT

AND:

**PERMANENT SECRETARY FOR EDUCATION,
HERITAGE AND ARTS**

RESPONDENT

Appearances:

Mr. D. Nair for the Applicant.

Ms. R. Pranjivan for the Respondent.

Date/Place of Judgment:

Wednesday 20 October 2021 at Suva.

Coram:

Hon. Madam Justice Anjala Wati.

RULING

A. Catchwords:

Employment Law – Application for leave to appeal the decision of the ERT – ERT ordered the default judgment to be set aside and the substantive cause to be heard by the ERT– default judgment was irregular and should be set aside as of right – the principle of functus does not apply when a court sets aside a default judgment.

Cause

1. This is the employee's application for leave to appeal the decision of the Employment Relations Tribunal ("*Tribunal*") of 15 January 2016 when it ordered that the default judgment issued by the Tribunal be set aside and the substantive cause be heard. It also ordered that the employee's application to strike out the employer's setting aside application be dismissed.
2. When the proceedings were on foot, I was informed by the parties that the substantive cause was waiting the decision on the leave to appeal application. I then directed that the Tribunal not wait for the leave application to be heard and proceed to hear the substantive cause.
3. By the time the leave application was heard, the main matter was completed in the Tribunal. I enquired from the parties whether there was a need for this application to proceed as it appeared from the nature of the proceedings that little purpose was going to be served. The parties informed me that they required a ruling for academic purpose only.
4. Whilst this not a case which will create any form of jurisprudence or impacts on public interest, I am still bound to deliver a decision as the parties require it. However, I must say that where the parties' substantive rights are not affected, they must not unnecessarily engage and require the court for a ruling as there are more deserving matters which need the attention of the Court. That time can be directed towards parties who deserve urgent attention of the Court. Having said that let me briefly state the background to the proceedings in the Tribunal.

Proceedings in the Tribunal

5. On 4 November 2015, the employee filed an application in the Tribunal seeking certain reliefs. The basis of the application was that he was denied a fair opportunity for the promotion to the position of the Head Teacher at Tavua Primary School since he was acting on that position since 2013. The reliefs sought were as follows:

1. *An order for the employer to comply with s. 77(1) (b) of the ERA and s. 127(8) (b) of the Constitution of Fiji in the filling of the post of the Head Teacher (ED 3C) at Tavua Primary School.*

2. *An order that the employer confirm the employee to the post of the Head Teacher at Tavua Primary School in accordance with s. 77 of the ERA and s. 127(8) (b) of the Constitution of Fiji.*
 3. *An order that the employer desist from discriminating the employee who is more meritorious and deserving for confirmation to the post of the Head Teacher at Tavua Primary School.*
6. The employee says that the employer was served with his application on 5 November 2015. The application was listed for first call in the Tribunal on 11 December 2015 on which day the employer failed to appear and the Chief Tribunal gave the following orders:
1. *That there be orders in terms of the motion until the hearing and determination of the motion, and*
 2. *That the status quo be maintained in that the applicant to continue to act as the Head Teacher at Tavua Primary School.*
7. The employer then filed an application to set aside the orders. The application for setting aside was listed for 12 January 2016. The employee says that his legal representative appeared in the Tribunal and informed that he needed to consult the employee on the setting aside application. The matter was then adjourned to 15 January 2016. On 14 January 2016, the employee filed an application to strike out the employer's setting aside application.
8. The employee says that when the matter was called on 15 January 2016, a ruling was delivered without him being heard on the pending applications that is the application to set aside and the application to strike out the setting aside application.
9. It is the employee's position that since the Tribunal had granted the interlocutory orders in absence of the employer, it had become functus and could not have granted any orders on the setting aside the application. It was further contended that the ruling on setting aside was

delivered by the Legal Tribunal when the interlocutory order was given by the Chief Tribunal making the setting aside orders bad in law.

Determination

10. I must start off by saying that the substantive application before the Tribunal was one which could not have been resolved by granting a default judgment. The nature of the orders sought required a determination of whether the process used by the employer to make the appointment of the Head Teacher was unfair and discriminatory against the employee. There was affidavit evidence that was adduced in support of the application and based on that evidence a finding was necessary. The process that was invoked by the Tribunal to issue the orders in terms of the motion was defective which makes the orders granted irregular and ought to be set aside as of right without any further need for the employer to show cause or justify its application.

11. The other concern I have is that when the order in terms of the application was granted, the Tribunal stated that it was interim until the matter was finally heard. However the nature of the orders it granted in default was effectively final. The effect of granting the orders in terms of the motion meant that the employer was ordered to confirm the employee to the position of the Head Teacher of Tavua Primary School as this was one of the reliefs sought in the motion. If the default judgment has this effect then there is no more need to hear the substantive matter. This order is also diametrically opposite to ordering that the affected employee continue to act as the Head Teacher. How can he be promoted to the substantive post and also be ordered to act in the same position? The inconsistency in the order is so inchoate that it is impossible to comply with the same.

12. Is the employer to promote the employee or to keep him in the acting position? If one order is complied with, it is automatic that the other will be breached. The orders are irregular.

13. I also find that the ERT usurped its powers and assumed the responsibility of the employer in determining the most suitable candidate for the post. This is in no way a matter that is within the ambit of the Tribunal's jurisdiction. What the Tribunal can decide is whether the process of recruitment is fair and non-discriminatory against the subject employee. Without making

such a finding and confirming the employee to the Head Teacher's Position is both irregular and ultra vires.

14. I now turn to the employee's application to strike out the setting aside application which I find was frivolous. The employee had a right to file an affidavit in reply to the setting aside application which right was granted but the employee chose to file a striking out application. No such procedure is available to the employee. The proper procedure was to file an affidavit in reply as ordered by the Tribunal. If an application for setting aside is filed and the affected party wants that application to be dismissed on merits, the proper course is to oppose the application and not to make an application to strike out the same. There is no need for a striking out application as the affected party can always raise the same issues whilst opposing the application. Be that as it may, I do not find that there is any material in the striking out application which was not considered by the Tribunal or that was material in assisting the employee's case in opposing the setting aside application.
15. Since the default judgment was irregular, it was proper for the Tribunal to have set it aside and order the substantive cause to be heard. I do not find any material based on which it is necessary for leave to appeal the decision of the Tribunal be granted. The employee has argued that the setting aside of the orders is not within the ambit of the Tribunal as it was functus when it granted the default judgment. The argument is preposterous.
16. The matter was not heard on merits and setting aside of default judgments do not come within the purview of the principles of res judicata or functus. The Tribunal had the powers to set aside the default judgment which was irregularly issued.
17. I must also address the employee's concern as to why the Legal Tribunal dealt with the setting aside application when the orders were issued by the Chief Tribunal. I understand from the judgment of the Legal Tribunal that due to the urgency in the matter as the school was due to start, the Chief Tribunal had agreed that the matter be dealt with by the Legal Tribunal as he was not available to deal with it.

18. I do not find anything untoward about the arrangement between the two judicial officers in dealing with the application on an urgent basis. There is no impropriety or lack of transparency in the way in which the matter was handled.

19. The employee should not have pushed for this application for leave given the manner in which he obtained the default judgment. He was also not affected in any way. His substantive application was heard by the Tribunal. Further, he continued to act in the position of the acting Head Teacher. The appeal proceedings brought by him has resulted in costs for the employer which should be reimbursed by him.

Orders

20. I dismiss the application for leave to appeal the decision of the Tribunal and order the employee to pay costs of the proceedings in the sum of \$500 within 14 days of the order.



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Hon. Madam Justice Anjala Wani

Judge

20. 10. 2021



To:

1. *Mr. D. Nair for the Applicant.*
2. *Attorney- General's Chambers.*
3. *File: ERCA 02 of 2016.*