

IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

APPELLATE JURISDICTION

CASE NUMBER: ERCA 14 of 2016

BETWEEN: **THE REGISTRAR OF TRADE UNIONS**
APPLICANT

AND: **FIJI PUBLIC SERVICE ASSOCIATION**
RESPONDENT

AND: **FIRE SERVICE UNION**
INTERESTED PARTY

Appearances: *Ms. R. Pranjivan for Applicant.*
Ms. M. Rakai for the Respondent.
Representative of Fire Service Union – Mr. Timoci Nakarovu.

Date/Place of Judgment: *Monday 22 November 2021 at Suva.*

Coram: *Hon. Madam Justice Anjala Wati.*

RULING

1. The Registrar of Trade Unions ("**RTU**") is seeking leave to appeal the decision of the Employment Relations Tribunal ("**Tribunal**") for refusing to set aside the orders it granted in absence of the RTU.

2. It is crucial to outline the history of the proceedings. On 23 August 2016, the Fiji Public Service Association ("**FPSA**") filed a motion in the Tribunal and sought the following orders:
 - a. *That the RTU is in breach of s. 125 (1) (f) of the ERA.*
 - b. *That the RTU comply with s. 125 (1) (f) of the ERA.*
 - c. *That the RTU has refused to give the date of the registration of the FSU even though several reminders were sent to her.*
 - d. *That the RTU appears to intentionally neither acknowledge FPSA's letter seeking information on the purported In-House FSU nor sent a substantive reply; and*
 - e. *That the RTU's attention was drawn to the provisions of the ERA before she gave approval of the registration of the purported FSU.*
3. The motion was listed for hearing on 29 August 2016 at 9am before the Chief Tribunal. In absence of any appearance by the RTU, the ERT proceeded to grant the following orders on the same day:
 1. *That the RTU has breached Section 125(1) (f) of the ERA.*
 2. *That the RTU will furnish the FPSA with details of the FSU including the date of registration.*
 3. *That the failure to provide the above information jeopardized the FPSA's right of appeal under s. 139 of the ERA.*
 4. *That the RTU pays costs for non-attendance and wastage of hearing time in the sum of \$400.*
4. Subsequently the RTU filed a motion to set aside the orders of the Tribunal. Upon hearing, the application for setting aside was dismissed on 24 November 2016.

Tribunals Findings on the Setting Aside Application

5. The Tribunal ruled that the RTU had not provided a defence on merits through the affidavit. It also went onto find that s. 47(1) (b) of the ERA is a lifeline of the Union as it is part and parcel of the collective bargaining process provided for in the International Labour Organization (ILO) Convention No. 98. The Convention deals with the right to organize for Collective Bargaining purposes, a core Convention ratified by Fiji as a member state of the ILO.
6. The ILO convention No. 87 is another core Convention ratified by Fiji and it deals with Freedom of Association, providing the right to join a union of one's own choosing. The Tribunal stated that it came to light in the evidence that the employees had been put under duress due to their being members of the FPSA Union. The Tribunal found that complaints have also been made that the employees were threatened to join the in-house union if they were to be considered for promotion. The Tribunal relied on the copy of the in-house union circular which in essence stated that it was the best climate for the staff to form their own in-house union. The circular also stated that everyone is on individual contracts and that there will be no collective bargaining.
7. Since there was evidence of an in-house union, the Tribunal found that that breached both the ERP and the ILO Convention No. 98.
8. The Tribunal went onto further find that the FPSA was not given an answer to its enquires on whether the new Union was registered or not. S. 138 (a), the Tribunal found, provides that if an application for registration of a trade union is made then the same should be gazetted within 28 days. The Tribunal stated that either there was no gazetting of the application to register a trade union or that FPSA did not see the gazette. Whatever is the situation, the FPSA's right to appeal the decision of the RTU was affected.

Parties Position on Leave

9. The RTU first identified the reasons why it did not attend the proceedings on 29 August 2016. It stated that the officer in charge of the file had prepared written instructions for another counsel to appear on the date but that officer who was to appear did not receive the instructions on time. The failure to appear was not deliberate and not out of disrespect for the Tribunal.
10. The RTU stated that in the substantive application, the FPSA alleged that the RTU had breached s. 125 (1) (f) of the ERA by registering the FSU as a trade union which was being dominated by the employer. The RTU says that it was not given the opportunity to respond to the allegations made by FPSA as the orders were granted on the first call of the matter. It was averred that the FPSA also failed to provide any sufficient or satisfactory evidence in support of the allegations.
11. The RTU stated that she verily believes that all employees have the right to choose which trade union they wish to register under and if the trade union complies with all the requirements of Part 14 of the ERA, the trade union will be registered by it.
12. The RTU further stated its grounds of appeal. It was averred that the Tribunal erred in holding that the existence of the in-house union is a breach of the ERA and the International Labour Organization Convention No. 98. It also erred in holding that when the application for registration of the trade union was not gazetted, the FPSA was clearly disadvantaged in not being able to bring an appeal against the decision. The Tribunal also erred when it refused to set aside the decision in absence of any affidavit in opposition by the FPSA.
13. The FPSA also filed an affidavit in response to the application for leave and outlined its position. It stated that the leave to appeal the interlocutory decision is out of time. It was raised that the RTU is also out of time in raising an appeal against the substantive orders granted by the Tribunal. Since there is no stay of the orders and the RTU has not paid the costs ordered by the Tribunal, the application for leave in the appellate court should not be considered.
14. The FPSA stated that some of the employees of National Fire Authority were its members. It received complaints from its members that the management of the National fire Authority were

imposing on its employees to join an in-house trade union rather than to continue being members of FPSA.

15. The FPSA stated that 87 of the staff of National Fire Authority were its members who had given authority for deduction of union fees which was given to the employer and their membership fees was pending since 2015.
16. FPSA further stated that it wrote to the Permanent Secretary on 17 March 2016 to facilitate the deductions of the union fees. The FPSA says that whilst it was still following up on the payments authorized by its members, it was informed that the management had begun instructing officers to begin recruiting for an in-house union with the condition that as long as Chairman and Director John O'Connor are Board members everyone will be on contract.
17. FPSA says that it wrote to the Minister concerned to raise this issue with the hope that this would be resolved. On 12 May 2016 there was a meeting attended by the Minister, Executive Chairman and Director of National Fire Authority, and FPSA. FPSA says that it raised issues about deduction of union fees and also about the attempts to join an in house union to which the Executive Chairman responded that a circular had been issued asking for an in-house union to be formed and that an application had been made to register the in-house union.
18. The FPSA says that it gave the Minister the relevant documents showing that the salary deductions of its members were pending since October 2015 and that the deductions only began in May 2016.
19. FPSA also says that it wrote a letter to the Registrar of Trade Union and opposed the application of the proposed in-house union. FPSA says that it wrote a letter to the Registrar of Trade Union on 5 July 2016 to enquire whether the National Fire Union was registered so that a dispute could be lodged and also notified the RTU that the NFU had been collecting the subscriptions for several months which was contrary to the law. Since no response was received, another letter dated 28 July 2016 was written to the RTU.
20. FPSA says that it also wrote to the RTU on 26 January 2017 to investigate the merits of its complaint that the National Fire Authority was instrumental in the formation of the in-house

union from inception and since there was no response by the RTU, the FPSA was compelled to file proceedings in the ERT.

21. The FPSA members were influenced to resign and join the proposed in-house union and forced to sign contracts. It was stated by FPSA that there is a pending dispute before the Arbitration Court on the Collective Agreement of members. The FTU should have investigated the complaint and then made a finding which could be then open to further challenge.

Findings

22. In order to determine whether I should grant leave for the refusal to set aside the orders by the Tribunal, it is very important that I first see whether the FPSA had the locus to bring an application to the Tribunal and make allegations that the Registrar of the Trade Union has failed to comply with s. 125 (1) (f) of the ERA and that it complies with the same and provide to the FPSA the information on the FSU and the date of registration.
23. S. 125 of the ERA states the circumstances in which the Registrar of the Trade Union can refuse to register the trade union. Since the allegation is made that there was a breach of s. 125 (1) (f) of the ERA, let me outline that provision. It reads:

“The Registrar, after consultation with those who are intending to register as a trade union, may refuse to register a trade union if the Registrar is satisfied that –...

(f) the trade union is under the domination of the employer, whether by financial or other means, with the purpose of placing the trade union under the control of the employer”.

24. The first matter that needs to be clarified is that under s. 125, there is no obligation on the registrar to consult anyone except those who are intending to register as a trade union. If there is no evidence before the RTU that the in-house trade union was under the domination of the employer, and if all other requirements for registration are met, the RTU can proceed to registrar the trade union.

25. Any party who is aggrieved by the action of the Registrar of Trade Union under Part 14 of the ERA can appeal the decision within 30 days to the Tribunal. S. 125 falls under Part 14. It is therefore very clear that if there was a refusal by the Registrar under s. 125 to register the Fire Service Union, then an affected party could appeal the decision.
26. There are two problems in the application by the FPSA to the Tribunal. First of all, there was no refusal to register the Fire Service Union and therefore no appeal could lie arising of actions taken under s. 125. In this case, the RTU had proceeded to register the trade union under s. 120 of the ERA. If there was any concern why the RTU has registered the FSU, then the proper course of action was to file an appeal under s. 139 of the ERA. The FPSA could not file an application stating that there was breach of a particular section under Part 14 and that an order for compliance be given as Part 14 provides for an appeal and not for an application for compliance order.
27. The procedure in the Tribunal was wrong and there was no jurisdiction to grant the orders on the application for compliance. The orders are irregular and not sustainable.
28. The Tribunal also stated that the RTU was obliged to gazette the application for registration of the trade union within 28 days as stated in s. 138 of the ERA and since there was either no gazetting of the same or that the FPSA had not read the gazette, its right to appeal was precluded. How can the ERT find that the FPSA's right to appeal was precluded by the conduct of the RTU in not gazetting the application when it itself was not sure whether it was gazetted or not. It says in its decision that it could be possible that FPSA did not read the gazette. This shows that the Tribunal was aware that the right procedure was to appeal and since some provision of the ERA may not have been complied with, the application in the form of notice of motion and an affidavit could be heard. That is an error of law.
29. Further, the Registrar is obliged under the ERA to keep a register of trade unions. If the FPSA wanted to know whether FSU was registered, it ought to have filed a search of the register upon payment of requisite fee and obtained the information. The time for appeal would have started running from the date of registration. It appears that the proper section under which the appeal would fall is ss. 119 and 120 of the ERA. S. 119 (2) states that "*an application for*

registration as a trade union must be made to the Registrar in the prescribed form and signed by a minimum of 7 members of the trade union in applying for the registration provided that no member shall belong to more than one trade union in the same industry, trade or occupation concerning the same employer”.

30. The basis of application by the FPSA was that the employer had threatened its members and put them under duress to resign as members of FPSA and join the FSU. The appeal therefore would clearly be under s. 119 and 120 of the ERA. I repeat there could not be a fresh application for compliance.
31. If there is a remote possibility that the FPSA had the locus to bring an application for compliance in the Tribunal, then it ought to have established that the Fire Service Union was under the domination of the employer. There was no evidence to establish that as none of the employees who were members of FPSA gave any affidavit to that effect. This was something that the FPSA perceived when its members withdrew from the FPSA. The Tribunal then ought to have heard from the RTU whether it has made any assessment of the conflict raised under s. 125(1) (f) and if it has not why and if it has, the basis of the outcome of the decision.
32. The FPSA is trying to rope in the RTU for the alleged failure of the National fire Authority to deduct the union fees of its members and send it to FPSA. There is also an allegation that the National Fire Authority is imposing individual contracts on tis employees and that the issue is before the Arbitration Court. The aspect of non-deduction of union fees could be resolved by a proceedings against the employer. The aspect of the union fees will affect the registration of the fire service union if it can be established through the deduction authority that the current members of the FSU are already members of FPSA and that their withdrawal from FPSA was not voluntarily done by the employees. For the Tribunal to resolve whether the FSU should have been registered, once again an appeal against the decision of the RTU is the proper procedure.
33. Since the orders issued on the substantive application is bad for want of jurisdiction to hear compliance application under Part 14, the orders need to be set aside indefinitely. There will not be any useful purpose served if I was to grant leave to appeal the decision. I find that the

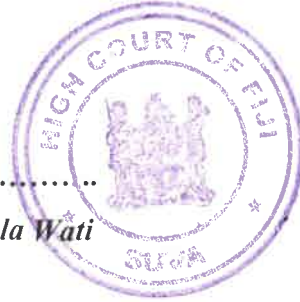
orders could not have been issued under a compliance application. The proper procedure would have been to appeal the decision of the RTU.

34. I must also state that the General Secretary of the Fire Service Union was also in Court and he submitted to the Court that the employees had long wanted a Union of their own as they understand their needs on the working conditions. They were given the approval to form an in house union and the employer only assisted on how it could be done. It was raised that the FPSA has so many bodies to look after and the employees wanted something of their own.
35. The information by the General Secretary is essential in the appeal proceedings if it is raised that the employer has influenced the employees to join another trade union and that the Registrar of the Trade Union was aware of this fact when she proceeded to register the Fire Service Union. What weight is placed on the information provided by the General Secretary is a matter for the Registrar of the Trade Union and on the appeal it should be shown that the Registrar has not made sufficient analysis of FPSA's complaint before registering the FSU.

Orders.

36. In the final analysis, I wholly set aside the orders granted by the Tribunal including the orders for costs. The application in the Tribunal cannot be maintained by a motion and an affidavit. Any party who is aggrieved by the decision of the Registrar of the Trade Union on its functions performed under Part 14 can only appeal the decision.
37. There is no proper appeal before the Tribunal and as such, no further directions are necessary from me for the continuation of the proceedings in the Tribunal.
38. The FPSA should pay costs of the proceedings to the Registrar of Trade Unions and the Fire Service Union in the sum of \$1,500 to each. The costs shall be paid within 7 days.

Anjala Wati



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Hon. Madam Justice Anjala Wati

Judge

22. 11. 2021

To:

- 1. Attorney – General's Chambers for the Applicant.*
- 2. Sherani & Company for the Respondent.*
- 3. Representative of FSU.*
- 4. File: ERCC 14 of 2016.*