

**IN THE EMPLOYMENT RELATIONS COURT**  
**HIGH COURT OF FIJI**  
**AT LAUTOKA**

**CASE ACTION NO. ERCA 05 OF 2023**

**BETWEEN:**                    **ENERGY FIJI LIMITED**

**APPELLANT**

**[Employer]**

**A N D:**                    **MELI QEREQERETABUA**

**RESPONDENT**

**[Grievor]**

Appearances:                    Mr. Narayan E. for the Appellant  
    Mr. Naidu S. (For Union) for the Respondent  
Date of Hearing:                 05 July 2023  
Date of Ruling:                 07 July 2023

## **R U L I N G**

### **INTRODUCTION**

1. Before me now is a Summons for Stay of Execution of Judgment filed by the Appellant, Energy Fiji Limited (“EFL”). The Summons is filed pursuant to section 254(4) of the Employment Relations Act and Order 45 Rule 10 of the High Court Rules 1988. It is supported by an affidavit of Naveen Lakshmaiya sworn on 22 May 2023.
2. The Respondent, Meli Qereqeretabua, opposes the application by an affidavit he swore on 13 June 2023 and filed herein. Lakshmaiya replies to Qereqeretabua by an affidavit he swore on 22 June 2023 and filed herein.
3. The decision for which EFL seeks a stay was granted by the Employment Tribunal on 11 May 2023. The Orders granted were as follows:

1. the non-renewal of Grievor's employment was unjustified and unfair.
  2. the employer must reinstate the Grievor to his former position or to a position which is not less advantage (sic) to the employee
  3. the reinstatement is effect (sic) from 22 May 2023
  4. the Employer to compensate Mr. Meli Qereqeretabua six months' wages and balance is deemed to be leave without pay (sic)
  5. the parties are to bear their own costs
4. Qereqeretabua sealed the above Orders on 16 May 2023. He then served the sealed Order on EFL on the same day.
5. Notably, despite the ERT's Order directing EFL to reinstate Qereqeretabua to his former position with effect from 22 May 2023, EFL did the exact opposite on the very day (22 May 2023). On the said date, 22 May 2023, EFL wrote and served the following letter to Qereqeretabua:

We refer to the above and we advise that the said decision of the Tribunal is being appealed by Energy Fiji Limited (EFL) and you are to proceed to leave till the hearing and determination of the matter. We advise you accordingly and EFL reserves its right in law and in fact in the matter.

Thank you.

Yours sincerely

**ENERGY FIJI LIMITED**

Sgd. Naveen Lakshmaiya

**General Manager Human Resources**

6. I did query in Court on the day of hearing as to whether or not Qereqeretabua is on paid leave. Counsel for EFL said he did not know. I gather from the Union's representative that Qereqeretabua is not being paid whilst on leave, and that EFL has not complied with any of the other Orders of the ERT.
7. I note with concern that the step taken by EFL is not only a direct defiance of the ERT's Order to reinstate Qereqeretabua on 22 May 2023, but it is also in direct defiance of section 230 (1)(a) and (3) of the Employment Relations Act. I set these out herein below:

230.—(1) If the Tribunal or the Court determines that a worker has an employment grievance, it may, in settling the grievance, order one or more of the following remedies—

(a) reinstatement of the worker in the worker's former position or a position no less advantageous to the worker;

(3) If the remedy of reinstatement is provided by the Tribunal or the Court, the worker must be reinstated immediately or on such a date as is specified by the Tribunal or the Court and, notwithstanding an appeal against the determination of the Tribunal or the Court, the provisions for reinstatement must, unless the Tribunal or the Court otherwise orders, remain in force pending the determination of the appeal.

8. In my view, section 230(1)(a) and (3), when read together, have the following effect:
- (a) where the ERT or ERC settles an employment grievance, and
  - (b) orders that the worker be reinstated
  - (c) the order for reinstatement must take effect immediately, or,
  - (d) on such date specified by the ERT or ERC
  - (d) regardless of any appeal by the employer
  - (e) unless the ERT or ERC shall order otherwise (e.g. unless the ERT/ERC orders a stay)
9. This means, for example, that an employer must reinstate the worker immediately after the Order is granted - or on the date stipulated in the Order – even if the employer intends to appeal the Order, and/or apply for a stay of execution.
10. The only time when an employer is absolved from complying with the Order for reinstatement is if the ERT or ERC shall Order otherwise.
11. The fact is, neither the ERT nor this Court has so ordered otherwise.
12. It would appear then that the letter which EFL wrote on 22 May 2023 to Qereqeretabua is unlawful in effect as it defies both the ERT's reinstatement Order as well as section 230(3) of the Act.
13. Having said that, I have considered the arguments raised in Court before me and also in the written submissions filed by both parties. I summarize EFL's case as follows:

- (a) EFL is aggrieved by the decision of the ERT. As such, EFL may appeal to the ERC (s. 242(1)).
- (b) an aggrieved party has a right of appeal (s.242 (1)) from any first instance decision of the ERT or where any ground of appeal from any appellate jurisdiction of the ERT involves a question of law (s. 242(4)(a) and (b) of the Employment Relations Act (“Act”) – PROVIDED THAT the appeal is made to the ERC in the prescribed form within 28 days from the date of decision of the ERT (s.242(2)).
- (c) in some situations, there is absolutely no right of appeal (section 242(5)). In other situations set out in section 242(5), an appeal will lie only if the Court grants leave (s. 242(5)(c), (d) or (e)(i) to (iii)).
- (d) Order 34 Rule 10 of the High Court Rules 1988 gives such an aggrieved party (who is exercising a right of appeal or has been granted leave to appeal) the right to apply for stay of execution.
- (e) section 230(3) of the Act also gives power to the ERC to grant stay
- (f) in this case, Qereqeretabua’s fixed-term contract had come to an end on the fixed-end date. EFL did not terminate his employment. As an employer, EFL has the prerogative not to extend or renew the contract.

In my view, the relative strength of EFL’s argument is no reason why it should not comply with Section 230 (1) and (3).

14. The key points in the Union’s (Qereqeretabua’s) opposition might be summarized as follows:

- (a) the ERT had ordered EFL to reinstate Qereqeretabua effective from 22 May 2023
- (b) on 30 May 2023, Qereqeretabua filed a Notice of Motion before the ERT to obtain a Compliance Order
- (c) this application was made pursuant to section 212(1) and (2). The application was served on EFL on 08 June 2023.
- (d) EFL’s application for Stay is made pursuant to section 254(4) of the Act. This section is irrelevant. It deals with *Intimidation or Annoyance*.
- (e) the ERT’s Order directing EFL to reinstate Qereqeretabua is a *Compliance Order*.
- (f) section 242(5) (e) (iii) of the Act provides that no appeal shall lie from any compliance order of the ERT except with the leave of the ERT or the ERC.

- (g) as to what constitutes a *compliance order*, Wati J clarified these in **Bank of Baroda v Fiji Bank and Finance Sector Employees Union** – ERCA No. 4 of 2010.
- (h) as no leave has been obtained by EFL to appeal the decision of the ERT, EFL’s Notice of Appeal must therefore be dismissed.
- (i) in any event, the ERT was correct in its decision. EFL continued to employ Qereqeretabua for some time after the fixed-end date of his employment contract had passed. EFL and Qereqeretabua are therefore deemed to have entered into a new contract of service. The notice which EFL served on Qereqeretabua was either an unlawful termination of the new contract of service, or as the ERT opined, an unjustified and unfair non-renewal of Qereqeretabua’s old contract of service.
15. In **Natural Waters of Viti Ltd -v- Crystal Clear Mineral Water (Fiji) Ltd** (ABU 11 of 2004 delivered on 18 March 2005), the Fiji Court of Appeal discussed the factors which a Court must take into account in considering an application for stay pending appeal.
16. In general, a successful party is entitled to the fruits of the judgment which has been obtained in the court below.
17. The onus is on the appellant to convince the Court to interfere with that right by showing that there are sufficient grounds that a stay should be granted. To succeed in that regard, the appellant must convince the Court (1) that the appeal will be rendered nugatory if stay is not granted and (2) that the balance of convenience and the competing rights of the parties point to the granting of a stay.
18. I am not inclined to grant stay. In my view, the appeal will not be rendered nugatory if stay is not granted. I say that, mindful that the effect of refusing stay is that EFL will have to reinstate Qereqeretabua to his former position and that all the other Orders of the ERT will have to be complied with by EFL. I see no problem in this. That is simply to comply with the section 230(3). In this regard, the reinstatement will have to be effected conditional upon the outcome of the substantive appeal. I am also of the view that the balance of convenience and the competing rights of the parties militate against the granting of the stay.

19. I grant costs in favour of the Respondent which I summarily assess at \$1,000-00 (one thousand dollars only).



.....  
Anare Tuilevuka  
JUDGE

07 July 2023