IN THE EMPLOYMENT RELATIONS COURT
IN SUVA
APPELLATE JURISDICTION

ERCA No. 27 of 2017

(On Appeal from the Employment Relations Tribunal in the matter of Employment Grievance No. 86 of 2017)

BETWEEN : **AIR TERMINAL SERVICES (FIJI) LIMITED**

APPELLANT

AND : **JASON DUTT**

RESPONDENT

BEFORE : M. Javed Mansoor, J

COUNSEL : Mr. N. Tofinga for the appellant

: Mr. S. Nacolawa for the respondent

Date of Hearing : 29 April 2020

Date of Judgment : 4 August 2023

JUDGMENT

EMPLOYMENT LAW Appeal — Tribunal's ordered reinstatement and payment of salary and entitlements – Reinstatement not challenged – Breach of collective agreement provision on internal appeal– Sections 110 (4) and 164 of the Employment Relations Act 2007

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1. This is an appeal against the decision of the Employment Relations Tribunal dated 14 November 2017, which ordered the reinstatement of the respondent with effect from 1 December 2017. The appellant was also ordered to pay the respondent for his period of absence from work, including the restoration of his service entitlements from 7 April 2017.

2. The appellant filed a notice of appeal and grounds of appeal on 29 November 2017. Thereafter, amended grounds of appeal were filed on 3 September 2019. The new grounds are reproduced below:

1) "That the learned Tribunal in the Court below erred in fact and in law when he allowed the Worker to circumvent the provision of Article 26 in the FASA/ATS Collective Agreement in hearing and determining his reported employment grievance despite the fact that the Worker was a member of the Union, the Union and the Employer had entered into an agreement in 1988 and that the said agreement was registered at the office of the Registrar of Trade Union and that the agreement is enforceable within the meaning of s.164 of the ERA 2007.

2) That the Learned Tribunal in the Court below erred in fact and in law when he failed to properly consider the extent of which the action of the Worker contributed to the employment grievance when he determined the quantum of remedies for the Worker in his Decision of 5th September 2017".

AND TAKE FURTHER NOTICE that the Orders and remedies sought are as follows:-

1. THAT other than the decision of the Learned Resident Magistrate to reinstate the Worker all other orders to be wholly quashed.

2. THAT the Court declares that the Grievor ought to have followed the provision in Article 26 of the ATS/FASA MOA.

3. Cost as deemed appropriate by this Court".

3. The appellant does not contest the tribunal's directive to reinstate the worker.

4. At the hearing, the appellant made oral submissions. The respondent did not do so. However, both parties filed written submissions.

5. The appellant submitted that an inquiry was held into the conduct of the respondent as he had disclosed certain confidential information. The appellant's disciplinary inquiry committee found the respondent guilty and recommended termination of his contract of employment. The appellant denied that the respondent's employment was terminated and submitted that the disciplinary committee had recommended the termination of his employment. This recommendation, it was submitted, did not take effect until the internal procedures were exhausted.

6. That contention is not entirely correct. Although there was an initial recommendation by the disciplinary committee, this was followed by a letter of termination dated 28 March 2017 from the manager human resources, which was confirmed by the same manager by letter dated 7 April 2017. The matter is not of much significance as the tribunal ordered the worker's reinstatement, which is not in issue in this appeal.

7. The appellant's position is that once the disciplinary committee makes a finding and informs the employee of its decision, the employee or the company can appeal such decision in writing within 7 days to the committee of review in terms of article 26 of the collective agreement between the union, Federated Airline Staff Association (FASA), and the appellant. The appellant contends that the employee ignored this provision and reported an employment grievance to the chief mediator on or about 3 April 2017. Thereafter, the matter was referred to the tribunal.

8. The appellant contends that this is a violation of section 110 (4) of the Employment Relations Act. Counsel submitted that article 26 of the collective agreement should have been enforced and a finding made that the worker had failed to exhaust the internal procedure. The appellant submitted that the

respondent had incorrectly declared in the ER form 1 that he had complied with section 110 of the Act.

9. The appellant submitted that his client was not contesting the order to reinstate the respondent, and that the respondent was already reinstated to his position in compliance with the tribunal's order. The matter in controversy is the tribunal's order awarding lost pay and entitlements to the respondent. It was submitted that the respondent's losses were brought upon by his own conduct in failing to exhaust the internal procedures that are implied in his contract of employment.

10. The respondent submitted that the charges brought against the employee was unjustifiable as he had merely aired his opinion as to the new aircraft door opening procedures implemented by Fiji Airways. The respondent was alleged to have made comments to other staff after attending the disciplinary inquiry of another employee who was alleged to have violated aircraft door opening procedures. The respondent attended that inquiry as a representative of the union.

11. The amended grounds of appeal relate to the construction of article 26 of the collective agreement. The clause – titled, "Disciplinary Procedure" states:

a) "When it is proposed to interview an employee in connection with an alleged misconduct or irregularity which may lead to disciplinary action against the employee, he shall be informed in writing by the Chief Executive or his representatives of:

i) the purpose of the interview;
ii) the charge(s) against him;
iii) the fact that disciplinary action may result and
iv) his right to, if he so wishes, be accompanied by an official of the Association.

An employee may be stood down from duty with or without pay or partial pay by the Company pending the outcome of a disciplinary inquiry in cases where the incident or misconduct involving the employee is of a serious nature, in order to safeguard the employee's own interest and the continued smooth operation of the Company's business. Should the inquiry find that the stand down was not justified the employee shall be paid for any salary lost as result of the suspension.

b) The interview and investigation in connection with an alleged irregularity or misconduct shall be carried out by a Disciplinary Committee which shall consist of an equal number

of representatives (not exceeding two) nominated respectively by the Company and the Association, with a Chairman who shall be mutually acceptable to both the parties. In light of the investigation carried out by the Disciplinary Committee, the Committee shall determine whether or not disciplinary action is warranted and if so, the nature of such action. A decision reached by the majority of the Committee shall be the decision of the Committee, but if the members of the committee are equally divided in opinion the Chairman shall make a decision which shall be the decision of the Committee.

c) The Chairman of the Disciplinary Committee within 7 (seven) days of the hearing shall inform the employee in writing of the decision of the Committee and the proposed disciplinary action, if any.

d) After disciplinary action has been imposed or not imposed, as the case may be, the employee or the Company, as the case may be, shall have the right to appeal against the decision of the Disciplinary Committee on the grounds that the decision of the Disciplinary Committee is harsh, unreasonable or unjust, or that such decision is lenient, unreasonable or unjust having regard to all the circumstances of the case. The Employee or the Company shall advise the Chief Executive and the Association Secretary within seven (7) says of the decision of the Disciplinary Committee of his or its desire to appeal. The appeal shall be submitted in writing stating the grounds thereof.

e) An appeal under this Article shall be heard as soon as possible by a Committee of Review consisting of one representative nominated respectively by the Company and the Association and a Chairman who shall be mutually acceptable to both the parties. Those persons who have participated in the Disciplinary Committee referred to in Paragraph B above shall not be involved in the Committee of Review. A decision reached by the majority of the Committee of review shall be the decision of the Committee but if the members of the Committee are equally divided in opinion the Chairman shall make the decision which shall be the decision of the Committee.

f) "Disciplinary Action" shall mean, subject to compliance with the aforesaid provisions of this Article, temporary or permanent reduction of an employee's rate of pay or classification, suspension without pay for up to 20 working days or dismissal. A disciplinary action may comprise of any combination of the above penalties".

12. Article 26 D of the collective agreement specifically either party to appeal the decision of the disciplinary committee, to be made within seven days of the decision. As the appellant points out, the worker did not do this. The respondent's explanation was that the appeal would have been reviewed by a

committee made up of the management. Instead, he reported an employment grievance. The appellant submits that this is in breach of section 110 (4) of the Employment Relations Act. The provision states:

> "When an employment contract includes an internal appeal system it must not provide for an appeal to the Tribunal or Employment Court, and the internal appeal system must first be exhausted before any grievance is referred for Mediation Services"

13. In terms of section 164 of the Act, a collective agreement that is in force binds, and is enforceable by (a) the union and the employer that are parties to the agreement and (b) a worker who is a member of a union that is a party to the agreement.

14. The respondent was presumably a member of the union. Neither party raised concern on the matter. The parties were, therefore, bound by the terms of the collective agreement, and the respondent was required to exhaust the internal appeal system, which was not done. The appellant rightly submits that the respondent was in breach of the collective agreement by failing to do so.

15. The matter, however, does not end there. In determining this appeal, the appellant's response, when the respondent filed an employment grievance bears scrutiny.

16. There is no evidence that the appellant objected to the grievance being taken up before the mediator. As the matter was not settled, the grievance was referred to the tribunal for its determination. When hearing was taken up before the tribunal, the appellant did not take up the objection that it has raised in appeal. This was not done even when the resident magistrate questioned whether there are any preliminary issues to be raised.

17. In appeal, the appellant's position is that it accepts the tribunal's order for reinstatement. The appellant submitted that it has complied with the tribunal's order for reinstatement. Its objection is only in respect of the sums ordered to be paid to the respondent and the restoration of his entitlements from April 2017.

18. In the opinion of this court, the appellant and the respondent submitted themselves to the tribunal's jurisdiction to hear the grievance. The orders for reinstatement and for payment of employment dues are dealt with by the same decision of the tribunal. Having submitted to jurisdiction, and complied with part of the order, the appellant cannot now say that the tribunal was not competent to rule upon some of the matters raised by the grievance.

19. The appellant also submitted that the respondent contributed to his employment grievance, and that this was not considered by the tribunal.

20. After inquiry, the resident magistrate based his decision on the findings that he has made. The court has not been persuaded that those findings are without basis. Unless the appellant can show that the resident magistrate's findings are plainly wrong, this court will not disturb those findings.

21. In these circumstances, the appeal is dismissed with costs.

ORDER

A. The appeal is dismissed.

B. The appellant is directed to pay the respondent costs summarily assessed in a sum of $1,500.00 within 21 days.

Delivered at **Suva** this **4th** day of **August, 2023.**

M. Javed Mansoor
Judge