IN THE EMPLOYMENT RELATIONS COURT AT SUVA

CENTRAL DIVISION

CIVIL JURISDICTION

ERCA: 25 of 2019

BETWEEN:

NATIONAL UNION OF WORKERS

APPELLANT

AND: **WATER AUTHORITY OF FIJI**

RESPONDENT

Date of Hearing :	**21 August 2023**
For the Appellant:	**Ms. Vatege**
For the Respondent:	**Ms. Fatima G.**
Date of Decision:	**29 September 2023**
Before:	**Levaci SLTTW, A/J**

J U D G M E N T

(*APPEAL FROM EMPLOYMENT RELATIONS TRIBUNAL)*

Cause and Background

1. This Appellant Union representing the Employee appeals against the decision of the Employment Relations Tribunal (referred to as the 'ERT').

2. The Appeal stems from an application for enlargement of time (Motion and Affidavit) to bring a Grievance action against the Employer/Respondent which was dismissed in the Employment Relations Tribunal.

3. The grievance was for the unlawful termination of the Employee on 28th September 2018, a technical assistant, who, after completing a work at the burst main from Transmitter Road to Togalavusa in Nadi, requested his supervisor and was allowed to unload 4 buckets of backfilling on the night of 12th April 2018 at his residence in Namotomoto, Nadi and later re-loaded and took it back to the worksite the next day.

4. The Appellant has now filed their Grounds of Appeal against the decision of the Employment Relations Tribunal.

Grounds of Appeal

5. The Appellant has filed 13 grounds of appeal and the issues of determination are as follows :

   '*An Order that the decision delivered by the Resident Magistrate on the 2nd day of September 2019 be adapted under section 242 (7) (a) of the Employment Relations Act 2007 with the following orders–*

   a. *''The Learned Tribunal erred in law and fact in paragraph 3 of his ruling that the Grievor was terminated on the 1st of October 2018;*

   b. *The Learned Tribunal erred in law and fact in paragraph 5 of his Ruling that the Grievor filed the grievance 'well outside' the 21 days;*

   c. *The Learned Tribunal erred in law and fact and in law in paragraph 6 of the Ruling when in fact the union filed within time (20 days) pursuant to section 110 (4) of the ERA;.*

   d. *The Learned Tribunal erred in fact that the Union addressed their grievance to the wrong forum;*

   e. *That the Learned Tribunal erred in fact that the Tribunal terminated the Grievor;*

   f. *That the Learned Tribunal erred in fact and in law in paragraph 7 of his Ruling when he failed to consider that the Collective Agreement is the contract of*

employment and supersedes any contrary provisions in the Employer's Human Resources Manual;

g. *That the Learned Tribunal erred in fact in paragraph 8 of his Ruling that Grievor did not appeal to the Chief Executive Officer;*

h. *That the Learned Tribunal erred in fact in recognizing that the Manager Legal is the highest authority within Water Authority of Fiji;*

i. *That the Learned Tribunal erred in law and fact that there is no incumbent authority at the time and continues to be the case within Water Authority of Fiji;*

j. *That the Learned Tribunal erred in fact in paragraph 10 of his Ruling that Clause 21.4 of the Collective Agreement allowed for a mutual agreement on a time frame;*

k. *That the Learned Tribunal erred in fact and in law when he failed to consider that the 21 days is when the grievance first arose pursuant to section 170 (9) of the Employment Relations Act;*

l. *That the Learned Tribunal erred in law and in fact that the Collective Agreement constitutes an award of the Arbitration Court pursuant to section 191W of the Employment Relations (Amendment) Act No 4 of 2015;*

m. *That the Learned Tribunal erred in fact and in law when he made this Ruling 5 months after the Hearing contrary to section 171 of the Employment Relations Act;*

n. *Any other orders the Court deems fit.'*

Law on Appeal

6. Section 220 (1) of the Employment Relations Act 2007 stipulates that –

'220 (1) The Employment Relations Court has jurisdiction –

(a) To hear and determine appeals conferred upon it under this Promulgation and any other written law.'

7. Section 242 (2) (4) and (7) of the Employment Relations Act 2007 states –

'(2) An appeal to the court must be made in the prescribed manner within 28 days from the date of the decision of the tribunal.

(4) Subject to subsection (2) an appeal lies as of right to the Employment Relations Court –

(a) From any first instance decision of the tribunal; or
(b) Where any ground of appeal from any appellate jurisdiction of the tribunal involves a question of law.

(7) When hearing or determining an appeal the court may-

(8) Confirm, modify, or reverse the decision or a part of the decision of the tribunal or set aside the decision of the tribunal and substitute its own decision; or
(9) Refer the matter with or without any direction to the tribunal to reconsider, either generally or in respect of specified matters, the whole or part of the matter to which the appeal relates.''

8. An Appellate court will be slow to interfere with the factual findings of an original court unless they are plainly wrong or drew wrong inferences from the facts and the Appellate court need not exercise jurisdiction to interfere with the Tribunal's decision only because it exercised its discretion in another way (see Tuckers Employees and Staff Union –v- Goodman Fielder International (Fiji) Limited ERCA No. 28 of 2018). The Appellate Court will review a decision where-

(i) From the face of the record the Court finds that the Tribunal has blatantly erred in facts or law and
(ii) Has acted in ultra vires or has failed to consider a pertinent issue raised before the Tribunal.

9. The Appellate Court will not overturn a decision of the Tribunal unless the above factors have been met. Consideration is made to the observations of Lord Reid in Benmax -v- Austin Motors Co Ltd [1955] ALL ER 376 at 329 :

'I think the whole passage, refers to cases where the credibility or reliability of one or more witnesses has been in dispute and where a decision on these matters has led the trial judge to come to his decision on the case as a whole. That be right, I see no reason to doubt anything said by Lord Thankerton. But in cases where there is no question the credibility or reliability of any witness, and in cases where the point in dispute is the proper inferences to be drawn from proved facts, an appeal court is generally in as good a position in evaluating the evidences as the trial judge, and ought not to shrink from that task, though it ought of course to give weight to his opinion….' (underlining my emphasis).

Analysis

10. The court will address the grounds.

(a) *'The Learned Tribunal erred in fact in paragraph 3 of his ruling that the Grievor was terminated on the 1st of October 2018;*

11. The Court considered the facts and found that the evidence submitted in the ERT was by way of a Summary Dismissal Letter confirming that the Employee was dismissed from the date of the letter i.e. 28 September 2018. The ERT failed to place weight on this evidence and thus was incorrect to determine that the Employee was dismissed from 1st October 2018 when in fact he was summarily dismissed from 28 September 2018.

(b) *The Learned Tribunal erred in law and fact in paragraph 5 of his Ruling that the Grievor filed the grievance 'well outside' the 21 days;*

(c) *The Learned Tribunal erred in law and fact and in law in paragraph 6 of the Ruling when in fact the union filed within time (20 days) pursuant to section 110 (4) of the ERA;.*

12. For the purposes of Ground (b) and (c) the Court considered section 188 (4) of the Employment Relations Act 2007 which states –

> '188 (4) Any employment grievance between a worker and an employer in essential services and industries that is not a trade dispute shall be dealt with in accordance with Parts 13 and 20, provided however that any such employment grievance must be lodged or filed within 21 days from the date when the employment grievance first arose, and –
>
> (a) Where such an employment grievance is lodged or filed by a worker in an essential service and industry, then that shall constitute an absolute bar to any claim, challenge or proceeding in any other court, tribunal or commission; and
>
> (b) Where a worker in an essential service and industry makes or lodges a claim, challenge or proceeding in any other court, tribunal or commission, then no employment grievance on the same matter can be lodged by that worker under the Act.'

13. It is clear from the evidences that this is not a trade dispute. Furthermore it is not disputed that the Respondent is an Essential Service Provider.

14. The anomaly in determining when 'a grievance arose' according to the Appellant's submissions is because the Tribunal had earlier determined in National Union

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'(13) The employment grievance first arose on the day on which Mr Delai (the employee) was informed by WAF that his employment contract would cease.

(14) Therefore, Mr Delai's employment grievance first arose on 23 March 2021, as opposed to 30 August 2021 when he was first informed; and the 21 day period ended on 13 April 2021.

(41) Furthermore in line with the Court of Appeal decision in Abhineshwar Vinod -v- Fiji National Provident Fund CA No. ABU 0016 of 2014, Mr Ohms (in the case of Stanley Ooms -v- Chief Mediator and Fiji Airways ERT Misc Action No 23 of 2017) was entitled to lodge an application for grievance on 2 August, 2016 as he was dismissed on that day. He was unemployed on that day and in line with the definition of personal grievance under section 4 of the ERA he was entitled to bring an action against his employer. Mr Delai on the other hand, cannot bring an action on 21 March, 2021 because he was still employed by WAF.'

15. In the Tribunal's Ruling, in this case, it was determined that –

'5. The Grievor filed his Grievance on 24 October 2019, which was well outside the time limit of 21 days. This is not disputed by parties.

6. Section 188 (4) of the ERA is clear that all Grievances must be filed within 21 days. This 21 days will only be invoked after all the internal processes has been exhausted.'

When is the date in which the 'grievance rose'?

16. Employment grievance is defined in section 4 of the Employment Relations Act 2007 as –

'means a grievance that a worker, may have against the worker's employer or former employer because of the worker's claim that –

(a) The worker has been dismissed;
(b) The workers employment, or one or more of the conditions of it, is or are affected to the worker's disadvantage by some unjustifiable action by the employer;
(c) The worker has been discriminated within the terms of Part 9;
(d) The worker has been sexually harassed in the worker's employment within the terms of section 76; or
(e) The worker has been subject to duress in the workers employment in relation to membership or non-membership of a union.

17. In the case before the Tribunal, the Employee was dismissed on 28 September 2018 for misconduct. The Employee, through his union, opted to seek for reinstatement on grounds of unlawful dismissal and provided 48 hours to the Respondent for a response to the claim for reinstatement on the 2nd of October 2018.

18. It was only when the Respondent failed to respond that the Employee then lodged a grievance report for referral to the Mediation on 24 October 2018 in accordance with section 200 (1) (a) of the Employment Relations Act 2007.

19. In the Tribunal's decision in paragraphs 5 and 6 the copy records state-

'5. *The Grievor filed his Grievance on 24 October 2019, which was well outside the time limit of 21 days. This is not disputed by the parties.*

6. Section 188 (4) of the ERA is clear that all Grievances must be filed within 21 days. This 21 days will only be invoked after all internal processes has been exhausted.'

21. The Court finds that the grievance was not filed on 24 October 2019 but on 24 October 2018 and that the Tribunal erred in fact.

22. Contrary to this case is the case of National Union of Workers -v- Ministry of Employment (Supra) where the court held that the employee was still employed when he was first aggrieved. He should have lodged his grievance within the time he received his letter.

23. In the case of FTU -v- Ministry of Education, Heritage and Arts ERCA 12/18 Wati J held:-

'42 It is therefore in August 2017 when they formally knew and realized that their positions have been re-graded and that they were no longer holding the positions of heads of school. It is therefore very clear that any such grievance first arose in August 2007 and not May 2018.'

24. Hence from the case laws, it is apparent that the term 'when the grievance arose' is when the Grievor first knew of the grievances.

25. In this case, the Applicant was summarily dismissed and so it was correct to infer that his grievance arose on the effective date which was 28 September 2018, the date in which he was informed in writing of the decision of the Respondents. Hence the statutory time frame should have been calculated 21 days from the 28th of September 2018.

26. The Applicant's sort a response from the Respondent on 2nd of October 2018 with a time span of 48 hours and would have lapsed on 4th of October 2018. Again this occurred within the 21 day window.

27. It was only when the Applicant waited until the 24th of October 2018 to lodge and file his grievance with mediation that the lodgment was out of time. Despite having sufficient time after the 48 hour window for internal processes, he failed to lodge within the 21 day statutory time requirement.

28. In lodging the grievance on 24 October 2018, the Applicant was 5 days outside of the 21 day time period.

29. The Applicant had the liberty to exhaust all internal processes. However in doing so, keeping in mind the time limitation, to lodge his grievance with in time.

30. The Employment Relations Act does not provide any liberty nor powers to the Courts to grant or extend the 21 time limitation in lodging grievances and hence our hands are tied.

31. The court finds that the Applicant failed to lodge his grievance within time from when the grievance first arose.

32. The Court therefore finds that the Tribunal was correct and did not err in law.

Grounds (d), (e), (f) and (g)

33. For the grounds of Appeal (d), (e), and (g), the Court considered the Tribunal's records to determine these grounds together.

(d) *The Learned Tribunal erred in fact that the Union addressed their grievance to the wrong forum;*

(e) *That the Learned Tribunal erred in fact that the Tribunal terminated the Grievor;*

(f) …….

(g) That the Learned Tribunal erred in fact in paragraph 8 of his Ruling that Grievor did not appeal to the Chief Executive Officer;

34. The Court considered clauses 21 in the Collective Agreement as well.

35. The Applicant relies upon clause 21.4 as the appropriate methodology to resolve disputes or grievance's because:

(i) The Applicant is a member of the Union;

(ii) The Collective Agreement contains the agreed arrangements between the parties for grievances.

36. The Clauses 21.2 and 21.3 apply to a procedure regarding matters 'arising out of the employment and affecting an individual worker or group of Workers' during their employment and requires the Worker or Group of Workers to address their grievance with the relevant supervisor.

37. Now a Worker summarily dismissed cannot raise any issues with the relevant supervisor on receiving his letter of termination as he in effect is no longer a Worker by virtue of the terms in the Collective Agreement and the relevant supervisor during his term of employment is no longer his supervisor.

38. Therefore if the Applicant is unable to raise his grievance through clause 21.3 he is also unable therefore to align himself with the procedures in clause 21.4.

39. Clause 21.5 of the Collective Agreement requires that the matter be referred to the Mediation Services if the matter in dispute is of right or purported breach of contract only if the Worker has found no satisfactory settlement in the timelines stipulated in clause 21.4.

40. The Court finds therefore that the Collective Agreement clauses on Dispute and Grievances procedures does not sufficiently cover procedures for summary dismissal or termination from employment.

41. Thus the Tribunal did not err in law and in fact and was correct.

(f) *the Learned Tribunal erred in fact and in law in paragraph 7 of his Ruling when he failed to consider that the Collective Agreement is the contract of employment and supersedes any contrary provisions in the Employer's Human Resources Manual;*

(h) That the Learned Tribunal erred in fact in recognizing that the Manager Legal is the highest authority within Water Authority of Fiji;

(i) That the Learned Tribunal erred in law and fact that there is no incumbent authority at the time and continues to be the case within Water Authority of Fiji;

(j) That the Learned Tribunal erred in fact in paragraph 10 of his Ruling that Clause 21.4 of the Collective Agreement allowed for a mutual agreement on a time frame;

(k) That the Learned Tribunal erred in fact and in law when he failed to consider that the 21 days is when the grievance first arose pursuant to section 170 (9) of the Employment Relations Act;

(l) That the Learned Tribunal erred in law and in fact that the Collective Agreement constitutes an award of the Arbitration Court pursuant to section 191W of the Employment Relations (Amendment) Act No 4 of 2015;

(m) That the Learned Tribunal erred in fact and in law when he made this Ruling 5 months after the Hearing contrary to section 171 of the Employment Relations Act;

42. Given that the Collective Agreement did not adequately address grievance procedures for terminations, the Court considered whether the grievance procedures in the Human Resources Policy Manual is the appropriate document to be complied with by the parties.

43. I have not had the benefit of citing the provisions of the Employment Contract from the copy records between the parties nor did the Tribunal do such.

44. A Human Resources Policy Manual can appropriately be referred to only if the Employment Contract stipulates such.

45. Given that this Court has not had the luxury of citing the Employment Records, the Court cannot deny nor accept that the Human Resource Manual is the appropriate document to refer to for grievances.

46. Hence the appropriate grievance procedures, where there are no agreed procedures adopted by the parties, is in Part 13 of the Employment Relations Act 2007.

47. The provisions of section 110 (1) of the Employment Relations Act requires that agreed grievance procedures must be contained in the Contract or (2), if there is no agreement, to adopt procedures in Schedule 4 of the Employment Relations Act.

48. Section 111 of the Employment Relations Act stipulates that an employment grievance must submit their grievance to the workers employer within 6 months from when the action arose.

49. Given that the Applicant is an essential service provider, the period of lodging his grievances is limited to less than 21 days to enable the Greivor to lodge with the Court in accordance with section 188 of the Employment Relations Act.

50. Therefore in this instance the correct approach was for the Greivor to seek a response from the Chief Executive Officer within a limited time period, taking into consideration the 21 day timeline.

51. From the Court Records, the Applicant submits that the Greivor lodged his complaint with the Manager Legal who did not forward a response.

52. The Court finds that the Tribunal was correct. The Manager Legal was not the appropriate forum to raise the grievances and that the grievances should have been raised with the Chief Executive Officer or his representative.

53. I find that the Tribunal erred in law and fact when the Tribunal referred to the Human Resource Policy Manual as the appropriate procedures for addressing a grievance.

54. However I find that as a result, the Tribunal was correct in stating that the Employee should have sort an appeal or addressed his grievance with the Chief Executive Officer.

55. I base this solely in accordance with section 111 of the Employment Relations Act 2007 and not the Human Resources Policy Manual. I do note that the Human Resources Policy Manual may have been drafted in consideration of the requirements under the Employment Relations Act 2007, however it does not form the basis for which the Court arrives at its findings.

56. Under section 110 (3) and (4) of the Employment Relations Act, the Greivor is at liberty to lodged a grievance to the Mediation Services.

57. Therefore for Grounds (f), the Court finds that the Tribunal did not err in fact and in law when he did recognize that the Collective Agreement was an agreement between the parties but also admitted it contained in inadequate procedures to deal with terminations and summary dismissals.

58. For Grounds (h) (i) (j) I find that the Tribunal did not err in fact and in law.

59. For Grounds (k), I find that there is no relevance of section 170 (9) of the Employment Relations Act on employment disputes to this matter before the Court. This matter deals with procedures of employment grievances, and there is no dispute on these issues pending between the parties and properly reported before the Permanent Secretary and this ground is expunged.

60. For grounds (l) and (m), the Court finds that the grounds are irrelevant and vexatious as they raise issues that were never traversed by the Learned Tribunal in his findings nor did he question the existence of the Collective Agreement.

Orders

61. The Court will:

(i) Dismiss the Grounds of Appeal;
(ii) Decision of the learned Tribunal is upheld;
(iii) Costs against the Applicant for $700.00.

Mrs Senileba L.T.T.W-Levaci
A/Judge