

IN THE EMPLOYMENT RELATIONS COURT
AT SUVA

ERCC No. 08 of 2019

BETWEEN : ASHOK KUMAR RAM

APPLICANT

AND : MINISTRY FOR EDUCATION, HERITAGE AND ARTS

RESPONDENT

BEFORE : M. Javed Mansoor, J

COUNSEL : Mr. D. Nair for the plaintiff

: Ms. O. Solimailagi with Ms. Ali for the respondent

Date of Hearing : 8 July 2019

Date of Decision : 22 February 2023

DECISION

EMPLOYMENT LAW *Extension of time for filing of employment grievance – Essential service and industry – Sections 111 (2), 188 (4) and 234 (1) (a) of the Employment Relations Act as amended by Act No. 4 of 2015*

The following case is referred to in this decision:

a. *Fiji Teachers Union v Ministry of Education, Heritage and Arts 2018 FJHC 842: ERCA 12.2018 (11 September 2018)*

1. The applicant filed a notice of motion seeking an extension of time to file an employment grievance in this court. The question in this proceeding is whether the period of 21 days provided under section 188 (4) of the Employment Relations (Amendment) Act 2015 for the filing of an employment grievance between a worker and an employer in an essential service and industry can be extended by court.
2. In his supporting affidavit filed on 18 April 2019, the applicant said that he was appointed the principal of Waiqele College in 2015. After a review of the salary of all heads of schools, his substantive position was downgraded to assistant principal. He was subsequently appointed as acting principal. He attributed the downgrading to unsubstantiated allegations against him. He claimed that he was demoted without a finding of gross misconduct. He said that the respondent's permanent secretary exceeded her jurisdiction by changing his status to a lower grade, and that this decision was made arbitrarily and in bad faith.
3. The applicant stated that the delay in filing the application within the period of 21 days was due to his attempts to seek a review of the decision from the permanent secretary for the Ministry of Education, Heritage and Arts. On 4 April 2019 he received an email from the permanent secretary confirming the earlier decision to terminate his acting appointment and transfer him. He said he came to court after exhausting the internal dispute resolution process.

4. The respondent's permanent secretary, Alison Burchell, filed an affidavit on behalf of the respondent opposing the extension of time to file the applicant's grievance. Ms. Burchell averred that the applicant was appointed to the position of assistant principal on 17 August 2017 at Rampur College for the period 13 August 2017 to 15 January 2018. On or about 20 November 2017, the applicant was appointed to the position of assistant principal at Waiqele College for the period 15 January 2018 to 22 August 2021. She said that the appointment was a result of the outcome of the job evaluation exercise carried out by the Fijian Government in 2017. Ms. Burchell stated that on 29 April 2018, the applicant was issued an acting appointment letter for the position of principal at Waiqele College for the period 7 May 2018 to 22 August 2018. On 22 August 2018 the applicant was issued another acting appointment letter for the position of principal at Waiqele College commencing 23 August 2018 until 1 May 2019 or until the appointment is revoked.
5. According to the respondent's affidavit, during the applicant's time as acting principal at Waiqele College, the ministry received several complaints concerning the administration of the school. By letter dated 16 November 2018, the applicant was asked to show cause as to why his acting principal appointment should not be terminated. The applicant replied by his letter of 18 November 2018. By letter dated 27 November 2018, the applicant's appointment as acting principal was terminated. He was immediately transferred to Vunimoli Islamia College on his substantive position of assistant principal.
6. The respondent opposed the granting of an extension of time for the applicant to file his employment grievance saying that the grievance should have been filed within 21 days from the date it first arose. The affidavit stated that the email of 4 April 2019 merely confirmed the respondent's decision to terminate the applicant's acting appointment and transfer to another school.
7. The applicant filed his application for extension of time on 18 April 2019. The notice of motion relied on section 234 (1) (a) of the Employment Relations Act. This general provision empowers the court or tribunal to extend time to do an act required or authorised by the Act. The applicant contends that in terms of this

provision, the time to file the employment grievance could be extended notwithstanding the limitation specified in section 188 (4) which was introduced by the Employment Relations (Amendment) Act 2015.

8. Section 188 (4) of the Act states:

“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 any 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 this Act”.*

9. The applicant also contended that in view of section 111 (2) of the Act, the grievance must be lodged or filed with the employer within 21 days and there is no time limitation in filing a grievance in the court or tribunal. Section 111 (2) states:

“A worker who wishes to submit an employment grievance to that worker’s employer in accordance with the applicable employment grievance must, subject to subsections (3) and (4), submit the grievance to that worker’s employer within the period of 6 months from the date on which the action alleged occurred unless the employer consents to extend that period”.

10. The respondent submitted that the employment grievances of workers in the essential service and industry can only be determined in accordance with section 188(4) of the Act as amended. The respondent submitted that in terms of this provision an employment grievance has to be filed or lodged within 21 days from the date when the grievance first arose. On this basis, the respondent submitted that the applicant’s employment grievance should have been filed within 21 days from the respondent’s decision communicated by letter dated 27 November 2018. The respondent relied on the decision in *Fiji Teachers Union v*

*Ministry of Education, Heritage and Arts*¹. In that case, Wati J held that the plaintiff's case was time barred under section 188 (4) of the Act as the grievance was not filed within 21 days from the time it arose.

11. The respondent submitted that the applicant became aware of the transfer on 27 November 2018, and that the permanent secretary's email dated 4 April 2019 confirming the respondent's original decision was in response to the applicant's email sent on the same day. The respondent submitted that the applicant failed to file his employment grievance by 18 December 2018 – when the time for filing ended – and contended that the court did not have jurisdiction in terms of section 188 (4) of the Act to extend the time for filing of the grievance. The respondent submitted that Parliament imposed a stringent time requirement for filing an employment grievance under part 19 of the Act for the purpose of regulating essential services and industries and in the overall interests of the Fijian economy.
12. I accept the respondent's submissions. Part 19 of the Act deals with essential services and industries. The respondent is a government ministry. The definitions of employer and essential service industry include the government as a designated employer². There is no dispute that the worker and the employer are in the essential service and industry. The applicant's acting appointment was terminated by letter dated 27 November 2018. The notice of motion was filed on 18 April 2019, long after the time for filing an employment grievance had lapsed.
13. The legislature has clearly limited the period within which an employment grievance can be filed by a worker in an essential service and industry. The stipulated time period must be taken as mandatory as the legislature's objective in creating a statutory regime for the resolution of disputes between workers and employers in the essential services industry is apparent. The general power given to court by section 234 (1) (a) of the Act cannot be used to extend the time imposed for the filing of employment grievances of workers in the essential service and industry. The proposition in section 111 (2) of the Act cannot be taken

¹ 2018 FJHC 842; ERCA 12.2018 (11 September 2018)

² Section 185 of the Employment Relations Act as amended by Act No.4 of 2015

to override the specific limitation in section 188 (4) of the Act. If the applicant's argument is to be accepted, the time limit imposed by Parliament in respect of the essential service and industry would be rendered meaningless. For these reasons, the applicant's notice of motion will not succeed. It is a matter of regret that the disposal of this interlocutory decision has taken much longer than it should have.

ORDER

- A. The applicant's notice of motion filed on 18 April 2019 is struck off.

- B. The parties will bear their own costs.

Delivered at **Suva** on this 22nd day of **February, 2023**.



M. Javed Mansoor
Judge