IN THE EMPLOYMENT RELATIONS COURT OF FIJI
AT LAUTOKA -EXERCISING APPELLATE JURISDICTION

ERC APPEAL NO: 11 of 2021
ERT DISPUTE NO: 10 of 2020

BETWEEN : **NATIONAL UNION OF WORKERS**

APPLICANT-APPELLANT

AND : **DANAM (FIJI) PTE LTD**

RESPONDENT-RESPONDENT

BEFORE : A.M. Mohamed Mackie- J

COUNSEL : Mr. M. Anthony- For the Appellant
Mr. N. Kumar -with Ms. R. Prasad for the Respondent

DATE OF HEARING : 09th November 2023.

WRITTEN SUBMISSIONS: Tendered by both parties on 09th November 2023

DATE OF JUDGMENT : 26th February 2024 at (10.00 am)

JUDGMENT

A. INTRODUCTION:

1. This is an Appeal dated and filed on 05th November 2021 by the Applicant - Appellant ("the Appellant") against the determination of the learned Resident Magistrate of the Employment Relations Tribunal in Lautoka in ERT dispute No- 10 of 2020.

B. BACKGROUND:

2. The dispute, between the workers represented by the Appellant Union and the Respondent Employer (Respondent), was the alleged failure of the Respondent to pay Union members for the Lautoka COVID -19 Lockdown period from 20th March 2020 to 06th April 2020, which consisted of 18 days.

3. Mediation being attempted between the parties, with the facilitation by the Ministry of Employment and as the same was unsuccessful, the matter being referred, was heard by the Employment Relation Tribunal and the learned Tribunal Magistrate delivered his determination on 8th October 2021 dismissing the Application of the Union.

4. It is against the impugned determination of the Tribunal; the Appellant has preferred this Appeal on the following 03 grounds of appeal;

Ground-1- *That the learned tribunal erred in fact in paragraphs 21, 32, 33, 34 of his Ruling when he failed to consider that the section 24 ERA Amendment introduced on 29th May 2020 came into effect after the Lautoka Lockdown and does not have retrospective effect.*

Ground-2- *That the learned Tribunal erred in fact and in law in paragraph 23 of his Ruling that the clause 2 of the ERA (Amendment) Act 2020 only provides clarification on 'Act of God' when in fact it is an amendment to the Act itself.*

Ground-3- *That the learned Tribunal erred in law when it did not consider the principles of Frustration and Act of God under section 24 of the ERA in determining the obligations of the employer to provide work.*

C. HEARING OF APPEAL:

5. At the Appeal hearing held before me on 09th November 2023, learned counsel for both parties orally addressed the court and additionally filed their respective written submissions as well.

Submissions by the Appellant's Counsel:

6. The contention of the Counsel for the Appellant in relation to the ground of Appeal No-1 is that the Lautoka Lockdown was not an Act of God, it was a resultant effect of the COVID 19 pandemic. It has only been classified as an Act of God as per section 24(b) of the Employment Relations Act (Amendment), which came into effect only on 29th May 2020.

   Counsel added further that the amendment came into effect 3 months after the lockdown period when everything had returned to normalcy. Thus, the amended law in this case cannot and does not have retrospective effect

7. In relation to ground No-2, Appellant's Counsel submitted that the amendment to section 24 was a substantive amendment and not a clarification as cited in the impugned determination. He also submitted that the learned tribunal erred in citing the explanatory note that section 24 is merely a clarification when it was in fact an addition and substantially changed the scope of the law.

8. On ground No-3, counsel submitted that the doctrine of frustration does not apply to the matter in hand, because the Contract of Employment of the Appellants had not been frustrated. The Appellant at the time of filing the dispute had relied on section 24 (b) of the ERA prior to its amendment.

9. Counsel for the Appellant added further that the Respondent employer ought to have consulted and negotiated with the Appellants prior to the lockdown on the alternative change to the workers' terms and conditions of the employment. Those measures by the Employer for workers was not prevented by an Act of God and it could and should have been explored by the Respondent. Counsel added finally that the amendment does not have retrospective effect, the Respondent Employer must pay the workers for the lockdown period of 18 days under the previous section 24(b) of the ERA.

Submissions by the Counsel for the Respondent:

10. In relation to ground 1, Counsel for the Respondent, while justifying the findings of the learned Magistrate, referred to the paragraph 21 of the determination, wherein the learned Magistrate stated that "*COVID 19 outbreak, which was declared as a pandemic by World Health organization on 11th March 2020, qualifies as an 'Act of God' under section 24 as per the amendment introduced on 29th May 2020*"

Counsel also alluded to paragraph 32, 33 and 34 of the impugned determination, where in paragraph 32 it is stated by the Magistrate that "*Accordingly, there is a casual link between the COVID 19 pandemic and non-performance by Employer of its contractual obligation to provide work to these workers throughout 18 days lockdown period*"

In Paragraph 33 of the determination it is stated that "*Available evidence indicated that the COVID-19 Pandemic, which qualifies as an 'Act of God' is the ultimate cause that prevented the Employer from providing regular work to these workers during the relevant time period*"

As per paragraph 34 of the impugned determination, the learned Magistrate has finally observed to the effect "*In the circumstances, Employer is not required under sec 24 of ERA to pay regular wages to the workers as agreed under the employment contract*"

Finally, counsel for the Respondent emphasized his position that the learned Magistrate did not err in fact and/ or in law on his findings in paragraphs 21, 32, 33 and 34 of his determination.

11. Countering the ground of Appeal, No-2, Counsel for the Respondent has drawn my attention to paragraph 23 of the impugned determination wherein it is stated

> "*Explanatory notes 2.2 of Employment Relations (Amendment) Bill 2020 provides that 'Clause 2 of the Bill amends sec.24 of the Act to 'clarify' that an Act of God, for the purpose of this this section, includes a pandemic declared by the world health organization.*

By drawing this Court's attention to the relevant amendment in the Amended Act No 11 of 2020, Counsel for the Respondent argued that the purpose of incorporating a definition in the Act; that is explanatory notes, is to provide clarification.

With regard to the ground No-3, counsel argued that this ground of appeal simply does not have any merits as the learned Magistrate has given justification for his determination.

D. DISCUSSION:

12. The pivotal issue that begged answer before the learned Resident Magistrate of the Tribunal was, whether the Amendment to the Section 24 of the Employment Relations Act, which was brought into operation on 29th of May 2020, had the retrospective effect on the greater Lautoka Lockdown period, which had to be imposed on account of COVID -19 Pandemic from 20th March 2020 till 6th April 2020?

13. The facts that there was an outbreak of Covid 19 Virus Pandemic during the time material, it was an "Act of God", it had its adverse effects in Fiji as well, and it crippled all the non-essential activities and movements throughout the Country, including the Greater Lautoka, area were not in dispute.

14. It is also to be noted that nowhere in the Employment Relations Act or in its Amendments or in the collective Agreement entered into between the Employer and the Member Employees, a definition is given as to what is an "Act of God". What has been introduced by the Amendment to the section 24 of the ERA is the inclusion of a Pandemic, which was declared as an "ACT of God" by the World Health Organization.

15. An Act of God is neither predictable nor preventable and no one can say for sure as to how and in what foam it will befall and what would be the extent of devastation and/ or annihilation it could possibly cause. Any subsequent decisions and/ or measures taken by the government and/or respective authorities during the outbreak of the COVID-19 Pandemic to face the calamity were also instant and the Respondent Employer could not have had any role to play in taking such decisions and implementation of them. So, the position taken by the Counsel for the Appellant in paragraphs 14 and 15 of his submissions that the Respondent ought to have consulted and negotiated with the Applicants prior to the lockdown on the alternative to the workers' terms and conditions of employment, cannot be accepted.

16. Section 11 of the Interpretation Act 1967 states as follows;

> *"11. Where any written law is amended by any subsequent written law, the original law together with all amendments thereto shall be read and construed together from the date of commencement of the amendments or **retrospectively**, as the case may be, and the short title or citation of the original law shall be construed to include all written law covered by the same short title or citation. (Emphasis mine)*

17. There is no dispute, as highlighted by the learned Magistrate in paragraph 21 of the determination, that the COVID 19 outbreak, which was declared as a Pandemic by World Health Organization on 11th March 2020, qualifies as an 'Act of God' pursuant to section 24 as per the amendment introduced on 29th May 2020.

18. In my view, for the following reasons , the learned Magistrate's finding that there is a crucial link between the COVID -19 pandemic and non-performance by the Respondent Employer of its contractual obligation to provide work to those workers throughout the 18 days lockdown period , the COVID 19 was the ultimate cause that prevented the Employer from providing regular work and in the circumstances , the Employer is not required under section 24 of ERA to pay wages to the workers as agreed under the contract, are not blameworthy and his findings can remain unassailed.

In **Chang v Laidley Shire Council 234 CLR 1, (111)** referred to by the Counsel for the Respondent, the term 'Retrospective effect' is defined as follows;

> *"…….A retrospective statute ……is prospective , but it **imposes new results in respect of the past event ……A retrospective statute operates forwards, but it looks backwards in that***

it attaches new consequences for the future to an event that took place before the statute was enacted*" (Emphasis added)*

19. In **Saumatua v Suva City Council [2020] FJHC 482; HBC 88 .2012 (30 June 2020**) his lordship Deepthi Amarathunga-j stated as follows;

> *[13] Accordingly the text of the amendment cannot be read in isolation. It has to be read in conjunction with the principal Decree. Such reading makes it abundantly clear that the intention of the legislature was for the amendment to have retrospective effect and therefore the Learned High Court Judge has correctly applied section 11 of the interpretation act and given effect to the intention of the legislature and any contrary interpretation would have caused harm to the intention of the legislature. Therefore, I do not agree with the Learned Counsel of the Appellant on his averment that the Learned High Court Judge has erred in law."*

20. The main intention of the legislature in bringing this amendment to the ERA on 29th May 2020, soon after the lockdown period, appears to have been for the purpose of covering the immediate past period of lockdown as well in order to serve the sectors that were affected in numerous ways in their day-to-day activities during the very time period of lockdown. Because, the affected sectors were in need of immediate relief for the period they suffered before contemplating on the future. The amendment does not state that it will not have the retrospective effect.

21. If the Respondent company, being a non-essential sector, had dared to offer work to the members during the period of lockdown, despite the imposition of Curfew, boarder closure, mandatory Testing, isolation and quarantine, it would have led to the arrest of those workers and prosecution against both the workers and the Employer, which would have made the situation even worse to the workers.

22. As far as the ground 2 is concerned, it is my considered view that the clause 2 of the ERA (amendment) Act 2020 is an Amendment that provide a clarification on 'Act of God' for the purpose of this section, which includes a pandemic declared by the WHO and the purpose of incorporating a definition in the Act; that it is an explanatory note to provide clarification.

23. There is no reason for me to disagree with the findings of the learned Magistrate in paragraph 28 of his impugned determination, wherein the learned Magistrate states as follows;

> *"Legislative language of Employment Relations (Amendment) Act No-11 of 2020 does not suggest that the legislature intended to introduce a new meaning to 'Act of God' in sec.24. The explanatory notes discussed earlier indicates that the general effect of the amendment was to clarify and better reflect what the phrase 'Act of God' already meant. I conclude that the amendment introduced to section 24 of ERA to include a pandemic declared by the world Health Organization as an 'Act of God' is a clarification of law restating that the law has been, rather than a substantive amendment,"*

24. In relation to ground 3 of Appeal, I stand convinced that the learned Magistrate from paragraphs 16 to 20, has duly considered the principle of Frustration of a contract. He has found that the supervening events had not caused the end of the employment relationship and the Respondent had called the workers on 20th April 2020 to resume the work after lifting

of the lockdown, and thus the COVID 19 outbreak had not frustrated the employment relationship. I find that the ground of Appeal No-3 is also unmeritorious.

25. I don't find any reason to interfere with the findings of the learned Magistrate of the Employment tribunal in this matter. He has given due consideration to the evidence placed before him, the relevant Law in the amended Act, and the decided authorities on the subject and accordingly arrived at a justifiable determination.

26. I don't find any merits in the Grounds of Appeal adduced by the Appellant Union to warrant the intervention of this Court with the findings of the learned Magistrate at the Tribunal. Thus, I am of the view that the Appeal has to be dismissed.

27. The Respondent claims to have incurred a considerable amount by way of Costs in the Employment Tribunal and before this Court, on account of this matter. But the Magistrate has chosen not to impose costs on account of the proceedings before him. The Respondent has claimed a sum of $5,500.00 being the costs before this forum. However, considering all the circumstances, I decide not to impose any costs and order the parties to bear their own costs.

E. FINAL ORDERS:

1. The Appeal by the Union is hereby dismissed.

2. The determination of the learned Magistrate at the Tribunal is hereby affirmed.

3. No costs ordered.

4. A copy of this Judgment shall be dispatched to the Tribunal forthwith.

A.M. Mohamed Mackie
Judge

At High Court Lautoka this 26th day of February, 2024.

SOLICITORS:
For the Applicant: **National Union of Workers.**
For the Respondent: **Messrs. Krishna & Company- Barristers & Solicitors.**