

**IN THE EMPLOYMENT RELATIONS COURT OF FIJI**  
**AT SUVA**  
**CIVIL JURISDICTION**

**CIVIL ACTION NO. ERCC 012 OF 2023**

**BETWEEN** : **SANDEEP DUTT**  
**Plaintiff**

**AND** : **PERMANENT SECRETARY FOR AGRICULTURE &  
WATERWAYS**  
**Defendant**

**Counsel** : **Mr D Nair for the Plaintiff**  
**Ms A Harikishan for the Defendant**

**Hearing** : **30 April 2024**

**Judgment** : **7 June 2024**

**JUDGMENT**

- [1] Mr. Sandeep Dutt was employed with the Permanent Secretary for Agriculture and Waterways (the Permanent Secretary) at the material time. He was informed in October 2023 that he was being transferred from Labasa to Suva. His requests to be allowed to remain in Labasa were declined by the Permanent Secretary. Accordingly, Mr. Dutt filed these proceedings seeking declarations that the transfer is unlawful.
- [2] The issue for determination in this proceeding is whether the transfer was lawful.

**Background**

- [3] Mr. Dutt has been employed with the Ministry for Agriculture and Waterways since 5 May 2020. He was initially employed as a Senior Agricultural Officer in Ra. On 8 December 2021, Mr Dutt was promoted to the position of Regional Manager North.

based in Labasa, for a five-year period. A contract of employment was signed by the parties.

- [4] On 12 October 2023, the Permanent Secretary sent an internal Memorandum to Mr. Dutt informing him of his transfer to Suva. The Memorandum reads in its entirety:<sup>1</sup>

*I refer to the Official instructions dated 05/07/2023 on your suspension which is now lifted and reinstated.*

*By virtue of the powers vested with me as the Permanent Secretary and concurred by the Minister, as in the Fiji Constitution 2013 Section 127(8), it has been decided that you be posted to the Economic Planning and Statistics Division at Headquarters with effect from **14 November 2023** under your existing terms and conditions of employment.*

*Management has taken into consideration your expertise, operational experience and qualification would be well needed to lead the Projects and Budget Unit as its Principal Agriculture Officer.*

*As from Monday, 16 October 2023, you will report back to the Labasa Agriculture Office, however will be required to start preparing for your movement across to Headquarters and concurrently attend tasks assigned from the Acting Head of Agriculture Operations. Note that the current Senior Agriculture Officer, (Macuata) Mr. Sujendra Prasad will continue to oversee the smooth flow of work as the Officer in Charge for the Northern Division.*

*You will be eligible for payment of transfer allowances and cartage of personal effects for this posting.*

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<sup>1</sup> Annexed to affidavit of Sandeep Dutt dated 1 December 2023.

*Please report to Mr. Suruj Prasad, Acting Head of Agriculture Economic Development at 8 a.m. on the above date for discussions and assignment of work.<sup>2</sup>*

- [5] Earlier, on 24 August 2023, the Permanent Secretary had sent an internal Memorandum to the Permanent Secretary for Civil Service requesting a title change for a number of positions within the Ministry for Agriculture and Waterways.<sup>3</sup> This included a change of 'Regional Manager' to 'Principal Agriculture Officer'. Other job titles changed included Head of Agriculture, Head of Research, Head of Finance, etc. The annexure to the Memorandum provided the following explanation:

***These jobs have had a title change only, no other changes have been made to the role, please update the matter list.***

- [6] Mr. Dutt was not happy with the transfer. It does not appear that he was given any notice of the transfer prior to receiving the Memorandum. He expressed his concern to his employer. There followed a further internal Memorandum from the Permanent Secretary dated 1 November 2023, headed, 'Review of Posting'.<sup>4</sup> The Permanent Secretary approved the deferment of Mr Dutt's posting 'until the end of the school academic term, 08 December 2023'. The Memorandum further read:

*Therefore, you will officially report to the Economic Planning and Statistics Division at Headquarters with effect from 13<sup>th</sup> December 2023 as Principal Agriculture Officer ( Projects & Budget).*

- [7] Mr. Dutt applied for an internal review of this decision. In response, the Permanent Secretary sent a Memorandum to Mr. Dutt dated 9 November 2023.<sup>5</sup> The Permanent Secretary advised that the memorandum 'serves to reiterate Senior Management decision on letter dated 12/10/2023 and 01/11/23 with regards to your posting to Headquarters'. The Permanent Secretary's reasons were set out as follows:

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<sup>2</sup> It is obvious from the content of this letter that the Permanent Secretary has made a decision to transfer Mr Dutt to Suva. The decision does not invite Mr Dutt to provide his views on the transfer.

<sup>3</sup> Annexure 1B1 of affidavit of Isikeli Bosevakaturaga dated 16 April 2024.

<sup>4</sup> Annexed to affidavit of Sandeep Dutt dated 1 December 2023.

<sup>5</sup> Annexure 1B2 of affidavit of Isikeli Bosevakaturaga dated 16 April 2024.

1. *Following our discussion, the deferment of your posting was based on your request for this academic school term to end for which was approved to allow proper arrangements and facilitation will be arranged for your movement to Headquarters;*
2. *This was approved and you are to officially report to the Economic Planning & Statistics Division at Headquarters with effect from **13<sup>th</sup> December, 2023** as Principal Agriculture Officer (Projects & Budget);*
3. *The movement across was not immediate as ample time is given to prepare which is relevant to General Order 305(i);*
4. *The terms and conditions of your employment section 12, allows for transfer and **this decision was made<sup>6</sup>** due to the Ministry organizational need;*
5. *The movement was strategic and organizational decision due to your experience, maturity, and being a Degree graduate in Agriculture;*
6. *Your current salary band is equivalent and relevant to the Principal Agriculture Officer. (Projects and Budget) and is an appropriate fitting adding advantage to the Division and the Ministry due to your operational and divisional work experience as the former Team Leader with Fiji Sugar Corporation, Coconut Industry Development Authority, Senior Agriculture Officer, (Ra) and the Regional Manager (North);*
7. *Whilst the Ministry do understand your personal issues, however, the Ministry has its expectations and strategic needs to be fulfilled to support agriculture development for which your whole time will be required at the disposal of Government as a Civil Servant; and*
8. *In light of this, kindly informed that Senior Management decision remain status quo, and you will be expected to report to the Economic Planning and Statistics Division on **Wednesday, 13 December 2023**.*

[8] Mr. Dutt responded by filing the present proceedings on 4 December 2023 seeking declarations that the transfer is unlawful.

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<sup>6</sup> The Permanent Secretary expressly acknowledges that its memorandum of 12 October 2023 was a decision.

[9] It appears that Mr. Dutt did not report to Headquarters in Suva as required on 13 December 2023. The Permanent Secretary sent a Memorandum to Mr Dutt dated 24 January 2024 terminating his employment.<sup>7</sup> The Permanent Secretary treated Mr. Dutt's failure to report on 13 December as '*insubordination to Senior Management instructions*'. The behaviour was considered to be '*a failure to comply with lawful instructions of the Permanent Secretary*'. For this reason, Mr Dutt was informed that he was '*summarily dismissed with immediate effect*'.

### **Present Proceedings**

[10] As stated, these proceedings were filed on 4 December 2023. Mr Dutt filed an Originating Summons and supporting affidavit seeking the following relief:

- 1 **A DECLARATION** that the decision dated 1<sup>st</sup> November 2023 to transfer the Plaintiff as Principal Agriculture Officer (Projects and Budgets) from 13 December 2023 is in breach of the terms and conditions of his employment as Regional Manager North.
- 2 **A DECLARATION** that the said Transfer is in breach of section 20(1) of the 2013 Constitution of the Republic of Fiji that gives the Plaintiff the right to fair employment practices, including humane treatment and proper working conditions.
- 3 **A DECLARATION** that the said Transfer is in breach of section 77(1)(a) of the Employment Relations Act 2007.
- 4 **AN ORDER** that the Defendant immediately withdraws the said Transfer letter and the same is expunged from the records of the Plaintiff's personal file.
- 5 **AN ORDER** that the Defendant desist from discriminating the Plaintiff in terms of his employment and status quo prevailing prior to the issuance of the transfer letter dated 1<sup>st</sup> November, be maintained.

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<sup>7</sup> Annexure IB3 of affidavit of Isikeli Bosevakaturaga dated 16 April 2024.

6 Any further relief or orders the Court may consider appropriate in the circumstances.

7 Damages

8 Costs of this application

[11] The Permanent Secretary filed an affidavit in response from Mr. Isikeli Bosevakaturaga, Director Human Resources, dated 16 April 2024. Mr. Dutt filed an affidavit in reply dated 23 April 2024.

### **Legislation**

[12] Section 127(8) of the Constitution 2013 provides the Permanent Secretary with the power to determine all matters pertaining to the employment of staff, including terms and conditions of employment.

[13] Section 20(1) of the Constitution also provides:

*Every person has the right to fair employment practices, including humane treatment and proper working conditions.*

[14] The Civil Service (General) Regulations 1999 regulates employment conditions for civil servants. Regulation 13 deals with transfers and reads:

*The Permanent Secretary may transfer an employee without the employee's agreement, only if the Permanent Secretary has –*

*(a) given the employee 28 days written notice of the transfer;*

*(b) given the employee an opportunity to state his or her views about the transfer;*

*(c) considered any views stated by the employee.*

[15] Also relevant, is the contract of employment between the parties, in particular clause 12 which sets out the contractual responsibilities of the parties where the Permanent Secretary is considering transferring Mr Dutt. Clause 12 reads:<sup>8</sup>

***Transfer to another ministry or department***

*The Officer may be transferred to another ministry or department anywhere in Fiji on the existing terms and conditions of the contract. The decision of the Government will be final after consultations with the Officer.*

**Respective Positions of the Parties**

[16] Mr. Nair made the following arguments on behalf of the Plaintiff:

- i. The transfer of Mr Dutt is in breach of each of the provisions identified above. With respect to clause 12 of the contract, Mr. Dutt was not being transferred on his existing terms and conditions. Mr. Nair also submitted that the position in Labasa was distinct from the position in Suva, the former being a field position, whereas the latter is administrative.
- ii. Regulation 13 of the Civil Service (General) Regulations had not been satisfied. There was no consultation with Mr Dutt before the transfer decision of 12 October 2023. He submitted that transfers are normally done in consultation rather than by a unilateral decision of the Permanent Secretary.
- iii. Mr. Nair stated that Mr. Dutt was not qualified to perform the tasks in the Suva role and that Mr. Dutt was being set up for termination due to non-performance.
- iv. Mr Nair raised the fact of Mr Dutt's termination. He was at pains to emphasize that Mr. Dutt has not refused to be transferred. Mr Nair stated there have been ongoing communications between the parties, up to 24 January 2024, in respect to Mr Dutt's accommodation in Suva.

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<sup>8</sup> The contract is annexed to the affidavit of Sandeep Dutt dated 1 December 2023.

[17] In response, Ms. Harikishan made the following arguments for the Defendant:

- i. Mr Dutt's job title had changed in the transfer but the position itself was the same.
- ii. She submitted that regulation 13 of the Civil Service (General) Regulations was the primary provision that will determine the outcome of the present proceeding. If the Permanent Secretary has complied with regulation 13 then the transfer is lawful.
- iii. Ms. Harikishan argued that each of the three requirements under regulation 13 were satisfied as a matter of fact. More than 28 days was provided to Mr. Dutt of the transfer before it became effective, Mr Dutt had an opportunity to provide his views which he did and those views were taken into consideration as per the Permanent Secretary's Memoranda of 1 November and 9 November 2023.
- iv. She accepted that Mr Dutt is entitled to an accommodation allowance and supplied a copy of Chapter 6 of the General Orders of the Public Service Commission.
- v. I asked Ms. Harikishan whether the intention and spirit of these provisions anticipate that consultation with an employee will occur before a decision is made to transfer. Ms. Harikishan submitted that the plain wording of regulation 13(b) had been satisfied here.

[18] In reply, Mr. Nair advised that no proceedings had yet been filed by Mr Dutt in respect to his termination. Mr. Dutt was awaiting the outcome of these proceedings before taking any further action.

### **Issue and legal principles**

[19] This proceeding is confined to the Defendant's decision to transfer Mr. Dutt from Labasa to Suva. The issue for determination is whether the transfer by the Defendant was lawful.



- [20] The question is whether the transfer by the Defendant is in breach of the legislation or, indeed, the contractual obligations between the parties.
- [21] Section 127(8) of the Constitution empowers a permanent secretary to hire staff and make decisions in respect to the employment of the staff. No doubt, this includes the transfer of staff. However, this power is not unfettered. Section 20(1) of the Constitution affords every worker with the right to fair employment practices including humane treatment and proper working conditions. This protection must apply to decisions made by the Permanent Secretary in respect to the transfer of its employees.
- [22] The parties appear to be in agreement that regulation 13 of the Civil Service (General) Regulations is central to determination of the present proceeding. The Defendant relies on the decision on appeal by the Employment Relations Court in *Ministry of Education, Heritage & Arts v Pillay* [2024] FJHC 41 (26 January 2024). In that case the Ministry advised Mr Pillay of his transfer on 29 February 2016. Mr Pillay internally appealed the transfer on 2 March 2016 but did not receive a favourable response. He, therefore, lodged an employment grievance from the decision to transfer him. The reason Mr Pillay objected to the transfer was related to his personal circumstances. The Employment Relations Tribunal upheld Mr Pillay's employment grievance. As noted by Wati J at 13:

*The tribunal took the position that the powers allocated to the Permanent Secretary under the Constitution did not give him an unfettered discretion to transfer the worker wherever it wanted. There were standards to be met and benchmarks to be aligned with, like in the case Regulation 13 of the Public Service Regulations 1999, the good faith concept in the Employment Relations Act 2007 and s 20 of the Constitution.*

- [23] The Ministry appealed to the Employment Relations Court. Wati J noted that the Ministry relied on s 127(8) of the Constitution as well as clause 11 of the employment contract between the parties which permitted the Ministry to transfer an employee. The Court noted that clause 11 dealt with promotions and did not apply to Mr Pillay's case. With respect to s 127(8), the Court stated that the provision could not be read in

isolation and was required to be read with the other provisions in the Constitution, including s 20. Her Ladyship held that the Permanent Secretary could not act ‘*arbitrarily in making a decision to transfer the employee*’.<sup>9</sup> The learned Judge then referred to regulation 13 and stated:

27....*The Regulation sets out a fair and transparent process when transfers are carried out. For the transfer to be proper, fair and not arbitrary the process outlined ought to have been followed whether or not the employer thinks that this Regulation applies to it.*

28. *It is only through this process that s 20 of the Constitution could have been adhered to and the employer considered to have acted fairly...*

29. *I do not find that the employer can assert that it has powers to carry out an act. It may have such powers but in employment law, good faith and fairness is the principle that is the guiding principle. The employer did not practice fairness. It therefore cannot justify its decision to transfer the employee to the Central Division.*

## **Decision**

[24] Mr Dutt’s claim has been filed in the Employment Relations Court. The jurisdiction of the Employment Relations Court is prescribed under Part 20 of the Employment Relations Act 2007. Section 220(1)(h) provides that the Court has jurisdiction to, amongst other matters, ‘*hear and determine an action founded on an employment contract*’. The Defendant has not taken issue with this Court’s jurisdiction to determine Mr Dutt’s claim. In any event, I accept that I have jurisdiction to determine the present claim as it is founded on an employment contract between Mr Dutt and the Defendant.

[25] Mr Dutt contends that the transfer decision by the Defendant was unlawful for the following reasons:

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<sup>9</sup> At 21.

- i. There was no previous consultation with Mr Dutt prior to the Permanent Secretary's decision of 12 October 2023 to transfer him to Suva;
- ii. The positions in Labasa and Suva were not like for like as required under clause 12 of his contract;
- iii. Mr Dutt was not qualified for the position in Suva as he had mainly field experience and not administrative experience.

[26] I do not have sufficient information to make a determination in relation to the second and third grounds. I have not been provided with a job description for the two roles. Without a description of the tasks involved for the Suva position I also am unable to consider whether Mr Dutt is capable of discharging the role.

[27] With respect to the first ground, there appears to be no dispute that there was no consultation with Mr Dutt before the decision of 12 October 2023. Any consultation occurred after the decision.

[28] What are the obligations on the Defendant with respect to consultation? Regulation 13 is an appropriate starting place. It serves to set out the provision again:

*The Permanent Secretary may transfer an employee without the employee's agreement, only if the Permanent Secretary has –*

- (a) *given the employee 28 days written notice of the transfer;*
- (b) *given the employee an opportunity to state his or her views about the transfer;*
- (c) *considered any views stated by the employee.*

[29] Regulation 13 operates where an employee objects to the transfer. In such circumstances, the unhappy employee must be given 28 days notice of the transfer, an opportunity to provide their views on the transfer and have those views considered.

[30] In the present matter, the Ministry made its decision and provided Mr Dutt with the required 28 day notice of his transfer in its decision letter. Mr Dutt was not provided an opportunity to state his views on the transfer before the decision was made and nor was he invited in the decision to provide his views on the transfer. Mr Dutt simply made his views known after he received the decision that he did not wish to be transferred and the Ministry responded.

[31] The Defendant argues that on a literal reading of regulation 13 it has complied with the three requirements. The provision does not expressly require the consultation to occur before a decision is made. It suffices that the consultation occur before the transfer.

[32] In my view, the Ministry has not complied with regulation 13 of the Civil Service (General) Regulations, s 20(1) of the Constitution or cl 12 of the employment contract. It is incongruous with fair employment practice and good faith to interpret regulation 13 as permitting the Defendant-employer to decide to transfer Mr Dutt without first consulting with him about the transfer. My reasons for this are as follows:

- i. First, and foremost, s 20(1) of the Constitution affords every person the right to '*fair employment practices*'. It is not a fair employment practice for an employer to inform an employee that it has decided to transfer them without informing the employee of the potential transfer and seeking their views before making any decision. Indeed, in my view the Defendant's decision was not only unfair but oppressive in that it was presented to Mr Dutt as a fait accompli.
- ii. As Wati J emphasized in *Pillay* (supra), good faith and fairness are paramount principles in the Employment Relations Act. Regulation 13 must be interpreted in line with these principles. Fairness and good faith involve prior consultation with an employee before any decision. Until then, an employer is not aware of the impact of the transfer on its employee or even aware whether the employee is agreeable to the transfer.
- iii. A transfer of an employee from one city to another is a decision with significant impact for an employee and their family. The Defendant was

required to make the decision in a manner that was fair and transparent. Wati J noted in *Pillay*, at 23:

*Is it fair to transfer an employee to a place where he did not request to be transferred and in the process disrupt his ability to be close to his family in times of dire need? This employee's circumstances required consideration...*

- iv. Clause 12 of the parties employment contract is consistent with such a process. The clause expressly states that the decision will be final after consultation with the employee. As stated, the final decision was conveyed to Mr Dutt on 12 October 2023 without any consultation. It would be disingenuous of the Defendant to suggest that this decision was not intended to be final when the memorandum itself conveyed no invitation or opportunity for discussion on the transfer.

### **Conclusion**

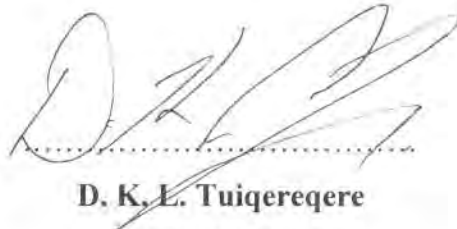
[33] There is no doubt that the Defendant may transfer its employees. However, it must do so in accordance with fair employment practices and in good faith. The unilateral decision by the Defendant here to transfer Mr Dutt from Labasa to Suva, without seeking his views on the matter, does not accord with those principles. It would be remiss, and in my view unlawful, to apply regulation 13 in a manner that is inconsistent with the principles that are enshrined in the Constitution and the Employment Relations Act.

[34] I am satisfied that the Defendant's decision of 12 October 2023 to transfer Mr Dutt to Suva was in breach of s 20(1) of the Constitution and regulation 13 of the Civil Service (General) Regulations 1999. It was also in breach of clause 12 of the parties employment contract. The fact that Mr Dutt provided his views and had those views considered before the date of the transfer, does not cure the breach by the Defendant.

## **Orders**

[35] Accordingly, I make the following orders:

- i. The Defendant's decision of 12 October 2023 to transfer the Plaintiff to Suva was unlawful as well as in breach of the employment contract between the Plaintiff and the Defendant.
- ii. The Defendant has terminated Mr Dutt's employment for reasons related to the transfer. It will need to reconsider the termination in light of the Court's decision. Leave is reserved for either party to seek further orders of the Court arising from i. above.
- iii. The Plaintiff is entitled to costs summarily assessed in the amount of \$2,500 to be paid by the Defendant within one (1) calendar month.



**D. K. L. Tuiqereqere**  
**JUDGE**

### **Solicitors:**

Attorney-General's Chambers for the Defendant