IN THE EMPLOYMENT RELATIONS COURT AT SUVA

APPELLATE JURISDICTION

CASE NUMBER: **ERCA 20 of 2017**

BETWEEN: **SHIV PRASAD AND GIJENDRA BUTTURU**

APPELLANTS

AND: **PERMANENT SECRETARY FOR EMPLOYMENT, PRODUCTIVITY AND INDUSTRIAL RELATIONS**

RESPONDENT

AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED

INTERESTED PARTY

Appearances: *Mr. S. Naidu for the Appellant.*

Mr. A. Prakash for the Respondent.

Mr. J. Apted for the Interested Party.

Date/Place of Judgment: *Friday 16 February 2024 at Suva.*

Coram: *Hon. Madam Justice A. Wati.*

JUDGMENT

A. *Catchwords:*

Employment Law – Was the PS correct in refusing to accept the workers' grievance under s.188 (4) of the ERA – Did the Tribunal rightly dismissed the appeal against the decision of the Permanent Secretary under s.188 (4)(a) of the ERA?

B. *Legislation:*

1. ***Employment Relations Act 2007 ("ERA"): ss. 188(4); 239***

Cause

1. This is an appeal against the decision of the Tribunal. The Tribunal had dismissed the workers appeal against the decision of the respondent, the Permanent Secretary, in refusing to lodge the workers grievances against the employer, the ANZ Bank.

2. The basis on which the Permanent Secretary had refused to lodge the grievances was that the workers had not filed or lodged their grievance within 21 days from the date when the employment grievance first arose pursuant to s.188 (4) of the ERA.

Tribunal's Findings and the Appeal

3. The Tribunal dismissed the motions appealing the decision of the Permanent Secretary on the basis that once the workers had lodged their grievance with the Permanent Secretary, they could not lodge a grievance again in the Tribunal pursuant to s.188(4)(a) of the ERA. The pertinent parts of the Tribunal's judgment reads:

"The issue under contention is the application of Section 188(4). This Tribunal is of the view that once the Permanent Secretary has made a decision to reject the lodgment of a dispute for a essential service, then pursuant to Section 188 (4) (a) that lodgment then acts as a complete bar to any claim, challenge in any other Court, Tribunal or commission. The filing of a Motion to appeal the decision of the Permanent Secretary is akin to a challenge, which this Tribunal does not have powers to deal with.

Thus this Tribunal cannot exercise any jurisdiction to deal with any such matter which falls under s188(4)…"

4. The so many grounds of appeal constitutes one focal issue which is whether the Tribunal was correct in making a finding that the Permanent Secretary's decision was not capable of challenge since a grievance was already lodged with the Permanent Secretary.

Law and Analysis

5. Let me first of all outline s.188 of the ERA since the employer was an essential service and industry. It reads:

> *"188-(1) All trade disputes in essential services and industries shall be dealt with by the Arbitration Court in accordance with this Part.*
>
> *(2) The Employment Tribunal and the Employment Court established under **Part 20** shall not have any jurisdiction with respect to trade disputes in essential services and industries.*
>
> *(3) For the avoidance of doubt **Part 20** shall not apply to essential services and industries, except as provided under subsection (4).*
>
> *(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 **Part 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 Promulgation"*

6. The worker had appealed against the decision of the Permanent Secretary. The Tribunal relied on s.188 (4) (a) to strike out the appeal.

7. I find that the Tribunal had misapplied s.188 (4) (a) to the workers appeal against the Permanent Secretary's decision.

8. S.188 (4) (a) will apply if the worker is raising the same grievance against the employer in any other forum. The purpose of this provision is to avoid duplicity of claims.

9. In this case the workers were not lodging a claim against the employer again for the second time. They were appealing the Permanent Secretary's decision to refuse to accept the lodgment of the grievances. How can that then be equated to the workers lodging their grievances again in another forum?

10. In any event, the Permanent Secretary had refused to accept the grievances by the workers for filing. How can then the Tribunal say that the workers grievances were already lodged once?

11. One must note that no grievance is filed directly at the Tribunal. All are filed with the Permanent Secretary first. So if a grievance is filed with the Permanent Secretary, it is the same grievance which will end up with the Tribunal. That cannot be counted as second grievance. S. 188(4) (a) will not apply when a matter ends up with the Tribunal for determination.

12. If the Permanent Secretary accepted the grievance, would the Tribunal not hear it based on s.188 (4)(a) and specifically on the basis that it was already lodged with the Permanent Secretary. I do not think so. Why should then s. 188(4)(a) be used not to hear an appeal against the Permanent Secretary which is otherwise permitted by s.239(1) of the ERA which reads:

"[EMP 239] Appeals from Permanent Secretary

239 *(1) A decision of the Permanent Secretary that is subject to appeal under this Act lies as of right to the tribunal.*

(2) An appeal from a decision of the Permanent Secretary must be made by way of a Notice of Motion filed with the Registry of the tribunal within 21 days from the date the proposed appellant received the decision.

(3) An appeal under this section is to be heard and determined by the tribunal"

13. Having said that, for finality purposes, it is important for me to examine whether the Tribunal could have entertained the appeal against the decision of the Permanent Secretary on merits. I find the answer in the negative.

14. S.188 (4) of the ERA states that any grievance against the employer in an essential service and industry must be lodged or filed within 21 days from the date when the employment grievance **first arose**. (*Underlining is Mine for Emphasis)*

15. The workers were dismissed on 16 October 2015. Their grievance therefore first arose on 16 October 2015. The workers are contending that they appealed the termination internally on 21 October 2015 and the decision on appeal was given on 25 July 2016. They contend that the time period starts or should start from 25 July 2016.

16. Section 188(4) is very clear. Pursuant to that section, the question that one needs to ask is when did the grievance first arise? The answer is simple: the day of termination. The time line thus starts from this day.

17. The workers should have filed their grievances within 21 days from the date of the termination. They did not do so. If there was any objection that the internal procedures of appeal had not been exhausted, a stay on the grievance would have assisted rather than disregarding the provision of the law by giving it their own interpretation and then running out of time.

18. I find that the substantive appeal against the decision of the Permanent Secretary has no merits and should be dismissed although the Tribunal was incorrect in dismissing it on an erroneous basis.

Final Orders

19. The Tribunal's basis to dismiss the appeal from the decision of the Permanent Secretary was wrong in law.

20. I however dismiss the substantive appeal against the decision of the Permanent Secretary on the basis that the workers had to lodge their grievance within 21 days from the date of their termination and having failed to do so, their grievances were time barred and could not have been accepted by the Permanent Secretary.

21. Each party to bear their own costs of the appeal proceedings.

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Hon. Madam Justice Anjala Wati

Judge

16.02.2024

To:

1. ***Fiji Bank and Finance Sector Employees Union for the Appellant.***
2. ***Attorney General's Chambers for the Respondent.***
3. ***Munro Leys for the Interested Party.***
4. ***File: Suva ERCA 20 of 2017.***