



Decision

Title of Matter: Reshmi Mala Shiromani (Worker)
v
Ministry of Education, Heritage and Arts (Employer)

Section: Section 218 Employment Relations Promulgation

Subject: Interpretation of Tribunal's Powers and Application for transfer of proceedings

Matter Number(s): ERT Grievance 140 of 2016

Appearances: Mr D Nair for the Worker
Mr A Prakash, Attorney General's Chambers for the Employer

Dates of Hearing: 24 January 2017

Before: Mr Andrew J See, Resident Magistrate

Date of Decision: 25 January 2017.

Background

1. This is a referral made to the Tribunal in accordance with Section 194(5) of the *Employment Relations Promulgation 2007*. At issue is a grievance that has been filed by Ms Reshmi Mala Shiromani, pertaining to a decision made by the Respondent Employer on 21 June 2016, whereby Ms Shiromani was demoted, issued with a final warning and transferred to another school.
2. Mr Nair on behalf of the Worker contends that this is a matter that can be resolved within the powers conferred to this Tribunal by virtue of Section 188 of the *Employment Relations Promulgation 2007*. Mr Prakash of Counsel, on the other hand, believes that the matter is one best addressed through a recently created Civil Service Reform Management Unit ("CSRMU"), that appears to have been established within the Ministry of Economy.¹

¹ Counsel provided the Tribunal with an extract from an advertisements within the 'Fiji Sun' Newspaper dated 10 December 2016 at page 18, that offers aggrieved employees of the Ministry of Education, to have recent disciplinary decisions made by that Ministry, reviewed.

3. It is noted by this Tribunal, that the combined effect of the promulgation of the *Constitution of the Republic of Fiji* in 2013, together with the passing of the *Public Service (Amendment) Act 2016*, has given rise to a redistribution of responsibilities in the management of public sector disciplinary issues. The Tribunal notes that the new statutory framework has provided for the establishment of a Civil Service Ministry, greater autonomy to Permanent Secretaries to take disciplinary action against staff² and a 'paring back' of the previous responsibilities given to the Public Service Commission in such matters. While the preliminary view of the Tribunal was that the matter may be one better dealt with by the Public Service Disciplinary Tribunal, upon further analysis, that view does not appear to be supported by the new statutory framework. I will address my observations in this regard.

The Constitution and the Employment Relations Tribunal

4. Section 102 of the Constitution, provides that a written law may establish the authority of a tribunal, such as the Employment Relations Tribunal. The powers and functions of the Tribunal are well set out within the *Employment Relations Promulgation 2007*. Mr Nair for the Worker submits that with the passing of the *Employment Relations (Amendment) Act 2015*, that employment grievances of this type can now be dealt with by the Tribunal.³ While Mr Nair did not address Part 19 of the *Promulgation* in any detail, he did nonetheless traverse the primary provisions that he says gives support to his contentions that this Tribunal would have jurisdiction to deal with the present grievance.
5. Specifically, he referred to the definition of "employer" at Section 185 of the *Promulgation* that included the term "the Government".⁴ In addition, he referred to the definition of "employment grievance" that is defined as follows:

"employment grievance" means a grievance involving dispute of rights including the following matters—

(a) dismissal or termination of any worker;

(b) discrimination within the terms of Part 9;

(c) duress in relation to membership or non-membership of a union;

(d) sexual harassment in the workplace within the terms of section 76;

or

(e) worker's employment, or one or more conditions of it, is or are affected to the worker's disadvantage by some unjustifiable action by the employer,

but shall not include any dispute of interest;

² See Section 127(7) of the Constitution.

³ That amendment has seen the repeal of the *Essential National Industries (Employment) Decree 2011*.

⁴ See also the definition of "worker" that includes "an officer or servant of the Government".

6. Mr Nair also referred the Tribunal to Section 188 of the Promulgation that sets out the respective jurisdictions of the Arbitration Court, Employment Tribunal and Tribunal Court, in dealing with trade disputes and employment grievances. It is perhaps useful to reproduce Section 188 in its entirety.

Jurisdiction over trade disputes and employment grievances

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 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 Promulgation.

7. By way of observation only, there are two critical issues that appear to exist in the case of workers of Government⁵ when seeking to avail of this process. The first is that they have a time window of 21 days for bringing grievances to the Tribunal. Secondly, once they have done so, such action shall prevent any other alternative right being agitated or claimed in another court, tribunal or commission.

The Public Service Disciplinary Tribunal and Section 120(9) of the Constitution

8. Section 120 of the Constitution sets out the establishment, powers and functions of the Public Service Tribunal. Specifically, Section 120(9) of the Constitution states inter alia:

⁵ The assumption here is that this term incorporates employees of the Civil Service.

the Tribunal shall have the function of hearing and determining disciplinary action instituted by-

(b)a permanent secretary

9. As Mr Nair submits, the language of Section 120(9)(b) appears consistent with the previous practice that existed by virtue of the *Public Service (Discipline) Regulations 2009*, in which case the former Public Service Commission would bring charges against public service officers under the *Public Service Act 1999*.⁶ While the Tribunal questioned Mr Nair as to whether or not those Regulations remained in force in all respects, particularly given the greater charter given to Permanent Secretaries in accordance with Section 127(7) of the Constitution and having regard to the language of Section 120(9)(b), that is not a germane issue for this Tribunal.⁷

The Way Forward for the Parties

10. Based on the submissions of the parties and upon a further analysis of the laws, the Tribunal is of the view that it does have the power to deal with the grievance before it.
11. The grievance arises out of disciplinary action taken by the Employer, where the Worker was demoted, issued with a final warning and transferred to another school. Those matters would all be captured within paragraph (e) of the definition of "employment grievance" as set out within Section 185 of the Promulgation. Such an approach is consistent with Section 188(4) of the Promulgation, providing that a grievance is lodged or filed within the 21 day window. An examination of the Form 1 initially filed by the Worker, supports the fact that the grievance had been initially lodged within time.
12. While, the Tribunal is of the view that the Applicant Worker should still avail of the opportunity to have any review of the disciplinary action taken by the Ministry for Education reconsidered through the Civil Service Reform Management Unit, there is no obligation for it to do so. Mr Nair makes clear, that in fact the Worker does not want that to take place.

Request to have question of law determined by Employment Court

13. Finally, Mr Nair for the Worker has asked that this question of law be referred to the Employment Court, in order that it may provide ongoing guidance to litigants in related proceedings. Firstly, as was pointed out to Mr Nair, the discretion to refer a question of law

⁶ See for example the former powers and responsibilities at Section 11 and 13 of the amended provisions.

⁷ That presumption was made having regard to the Referral Arrangements set out within Part 3 of the *Public Service (Discipline) Regulations 2009* and having regard to the amendments made to Section 11 and 13 of the *Public Service Act 1999* by virtue of the *Public Service (Amendment) Act 2016*; where responsibility for bringing charges against an employee (that is the disciplinary action for determination), appears now to be instituted by the Permanent Secretary and not the Public Service Commission.

to the Employment Court rests with the Tribunal, it is not compelled to do so, despite the request of a party. Secondly, Section 218 of the Promulgation, is an appropriate course of action to transfer proceedings and have the question of law determined, if the intention of the Applicant and the Tribunal is to have the matter in its entirety transferred to that Court. In the instant case, there is no such desire of the Worker for this to take place. The intention is only to have an interpretation provided as to whether the Tribunal can deal with the grievance before it. In light of the conclusion that the Tribunal has reached regarding its capacity to deal with this grievance, no such referral or transfer will be made to the Employment Court. Of course either party is free to appeal this finding to the Employment Court, should they so desire.

Conclusion

14. In conclusion, the Tribunal finds that it has power to deal with the subject grievance, having regard to Section 188(4) of the *Employment Relations Promulgation* 2007 and reliant on Parts 13 and 20 of the Promulgation.
15. The matter will be relisted for mention before the Tribunal on 10 February 2017 at 9.00am.



Mr Andrew J See
Resident Magistrate