



Decision

Title of Matter:	Losalini Lesu Daulali Sera Samuta Aminio Colawai v Fiji Revenue and Customs Authority	(Grievors) (Employer)
Section:	Section 211(1)(a) Employment Relations Promulgation	
Subject:	Adjudication of Employment Grievance (Entitlements Under Transfer & Housing Policy & Procedures)	
Matter Number(s):	ERT Grievance 162, 163 and 164 of 2016	
Appearances:	Messrs Mohinish and Singh, for the Grievors Messrs Ravono and Singh, for the Employer	
Date of Hearing:	16 January 2017	
Before:	Mr Andrew J See, Resident Magistrate	
Date of Decision:	2 March 2017	

Background

1. These three grievances have been referred to the Tribunal in accordance with Section 194(5) of the *Employment Relations Promulgation* 2007. At issue, is the application of the Human Resource Policy No 05/2012, entitled '*Transfer & Housing Policy & Procedures*' that is utilised by the Employer in the relocation of its staff from one duty station to another.
2. All three grievances have a common complaint theme and while they have been considered separately by the Tribunal, they nonetheless require a consistent method of interpretation. On that basis, the Tribunal will issue its finding and decisions for all three matters within the one determination.

The HR Policy 05/2012

3. The Skeletal Submission of the Employer sets out a brief history and explanation as to what it says is the purpose and rationale behind the Transfer and Housing Policy. According to the

Submission, the policy was approved by the Chief Executive Officer on 31 October 2012. Its purpose, "is to allow the movement of employees from one duty station to another for the achievement of capacity building and institutional needs". It does not appear to be an issue in dispute, that the HR Policy No 05/2012 has been incorporated by reference into the employment contract of the employees.¹ In the case of Ms Daulali and Ms Samuta, this takes place within Clause 6.1.2 of their respective Employment Contracts². An incorporation by reference, is also contained within the preamble to the Contract of Mr Colawai as located within Annexure E1 of the Affidavit of Mr Leone Nayacalevu dated 3 February 2017.

4. The upshot of all of this, is that the benefits and obligations existing under the HR Policy are part of the terms and conditions of employment. That is, there is a legal obligation imposed on the Employer that these benefits (at least insofar as they existed at the time of contract) will form part of the entitlements to be paid and provided to, for the relevant employees.

The Nature of the Grievances

5. While the grievances that have been referred to the Tribunal are all to be viewed as discrete matters, they share a common complaint. That is, the Respondent Employer has failed to properly apply the HR Policy, or done so in a manner that was unfair and discriminatory.

Losalani Daulali

6. The case of Ms Daulali is quite simple. She commenced employment with the Employer on 14 January 2002 as a Customs Officer. She was transferred from her initial point of recruitment to Nadi in 2004 and transferred back to Suva in 2013, as the outcome of a staff conduct matter. On 2 December 2014, Ms Daulali made an expression of interest in response to an Invitation made by the Employer to all staff. She ultimately secured a transfer and was posted to the Lautoka Office of the Employer. The Grievor claims and it is accepted by the Employer, that she has been initially paid the housing allowance upon being transferred to Lautoka, however it was subsequently ceased, when the Employer identified that it was an administrative error and that was not consistent with the Policy guidelines.

Sera Vunisa

7. The second Grievor, Ms Vunisa commenced her employment as a Customs Officer on 27 August 2007. The point of recruitment for Ms Vunisa was Nadi. It is accepted by the parties that while the Grievor was working in Nadi, she was in fact residing in Lautoka. On or around November 2014, Ms Vunisa was promoted to a position within the Lautoka Office and now claims to be entitled to the housing allowance, on the basis that she is no longer appointed to the location in which she was initially recruited.

Aminio Colawai

8. The final grievance that has been made, is in the case of Mr Aminio Colowai. Mr Colowai commenced his employment with the Employer on 13 February 2001. His initial point of recruitment was in Lautoka and he was transferred to Nadi in 2013. Mr Colowai resides in Nadi, although maintains that he is entitled to be paid the benefits under the terms of the policy, by virtue of his initial point of recruitment, being Lautoka. It is noted by the Grievors in all cases, that

¹ For a good analysis of that concept, see *Riverwood International Australia Pty Ltd v McCormick* [2000] FCA 889 (4 July 2000).

² Based on the assumption that the documents contained within the *Preliminary Submissions* of these persons, contained valid contract documents in place at the time.

they claim they can identify other persons within the employ of the Employer, who are in like situations to them and who are entitled to the benefits under the Transfer & Housing Policy & Procedures.

Interpreting the Policy & Procedures

9. The Policy & Procedures as issued and revised on 31 October 2012, have seven discrete sections:- Purpose; Policy; Definition; References & Related Forms; Operating Procedure; Authority and Accountability. There are a couple of key concepts that should be noted. Firstly, there is a distinction drawn between what constitutes the 'policy' as such and what are the 'procedures' that support the Policy.³ Within Section 3 the term 'Transfer' is defined to mean, "A *movement from one position to another, without a break in service from one duty station to another within the Authority*".

10. Secondly, within the Policy, a Transfer will only take place if there is an approved position in the structure⁴ and it may occur at the discretion of the Authority.⁵ Further and again within the Policy, to be eligible for the allowance, the transfer must be to a location other than the 'point of recruitment'. The procedures that support that Policy are located at Section 5. Within that Section, there are 3 distinct categories of (transfer) cases:-

- (i) The First, are co-ordinated as part of a yearly process where the Divisional Staff Board Committee with the approval of the Divisional General Manager forward to the National HR Manager, a list of proposed job rotations that will cause employees to be required to move from one duty station to another.
- (ii) The Second category are those employees who are posted because of either promotion or appointment, or the backfilling of a position as a result of promotion or appointment. As stipulated within the Procedure at Paragraph A 3, this activity takes place on a continuing basis.
- (iii) The final category of case, relates to where an employee, who has completed at least two years of service, makes a request to another station, where such requests are made by 31 May each year. In that case, the procedure makes clear that no allowances arise out of such a situation. The request and transfer in this case, is regarded as being one that has been 'Employee Initiated.'

The Case of Ms Daulali

11. Turning now to the grievances at hand. In the case of Ms Daulali, her evidence was that she had applied for an Expression of Interest issued by the National Manager Human Resources on 2 December 2014.⁶ Ms Daulali was provided with an official notice of her transfer by email communication dated 26 January 2015, from Emori Logavatu, Human Resource Officer.⁷ Within that communication, Ms Daulali was advised:

³ Note here that the Policy proper is located at Section 2 and the Operating Procedure is located at Section 5 within the document.

⁴ See Section 2 Point 10.

⁵ See Section 2 Point 2.

⁶ See Exhibit G 2.

⁷ See Exhibit G3.

In this transfer you will be eligible for housing allowance, transfer allowance and will be reimbursed reasonable travelling expenses on production of original receipts.

12. Ms Daulali has provided evidence to the Tribunal through her advocates, that she was in fact receiving monies as part of that Policy.⁸ What seems to have transpired after that point, is that the Employer was made aware that firstly the Employee had not physically relocated to Lautoka, but instead had elected to reside in Nadi and stay with family in Lautoka during the week. The culmination of the correspondence between the parties, is reflected within a letter addressed to four personnel from the National Manager People Capability & Culture on 12 July 2016.⁹ That communication appears to have done very little to have assisted in the resolution of this matter. The Affidavit of Mr Leone Nayacalevu dated 3 February 2017, suggests that the Employer had initially rejected the Expression of Interest made by the Grievor to take up a position at Lautoka. Annexure E3 to that Affidavit is prima facie evidence that the Employer declined or 'did not take up' the Expression of Interest made by Ms Daulali. Be that as it may, the email communication from Ms Wong to the then Chief Executive Officer, Mr Tikolevu dated 21 January 2015 ultimately agreed to allow the transfer on 'family grounds'. It is a matter of record, that the communication between those officers has no reference to the transferee not being entitled to housing and transfer allowance.
13. In fact, it is in response to that approval, that Ms Wong has advised her Human Resources Officer, Mr Logavatu that action should now be taken to effect that transfer.¹⁰ Mr Logavatu responded to that request on 26 January 2015 at 7.56am and thereafter some two hours later, confirmed that arrangement with Ms Daulali, including the fact that she would be eligible for "housing allowance, transfer allowance and will be reimbursed reasonable travelling expenses on production of original receipts". Again, it is a matter of record that the National Human Resource Manager as well as Mr Nayacalevu, were copied into that email communication. If they objected to the comments made pertaining to the allowances under the Policy, they certainly do not appear to have made that known to anyone. In fact, that entire issue of characterising the Grievor's transfer as being 'self-initiated' appears to be an issue manufactured well after that time.
14. Insofar as the issue of having the Grievor provide evidence that she has relocated to Lautoka, rather than remained domiciled in Nadi, the conduct of the Employer in my view is unreasonable in the circumstances. The Tribunal was advised that the Grievor had been initially transferred to Suva in 2013, arising out of personal issues at work. Had that matter been dealt with in a different fashion, the Grievor would have remained within the Nadi Office.¹¹ The requirement under the policy to attract the entitlements, assuming that it is a management initiated transfer, is that the Employee move away from their point of recruitment to another duty station. It would seem immaterial to the operation of the Policy, whether or not the Grievor moved her residence to Nadi or Lautoka, providing that she could attend work each day punctually and she was no longer located in the area that was her point of recruitment. One would have thought that travelling approximately 200 kilometres from Suva, was sufficient evidence of the fact that a

⁸ Exhibit G4. (See Payslip 25 Jan 2015 to 7 February 2015)

⁹ See Exhibit G8.

¹⁰ See email communication dated 21 January 2015 at 4.39pm.

¹¹ The Tribunal notes with concern the inconsistencies in the language of Paragraph 4 of the Employers Submission filed on 3 February 2017, and the email communication between Ms Wong and Mr Tikolevu dated 21 January 2016, where that issue was canvassed as it related to the other party.

transfer away from the point of recruitment had been effected. If punctuality is not an issue and there is no evidence that it is, then the location of the Grievor in Nadi as opposed to Lautoka, is of little import to the Employer.¹² The fact is, that Ms Daulali has taken up her appointment, has been required to relocate outside of her point of recruitment and is now living in another location. The duty location of Nadi and Lautoka, appear to attract the same allowance entitlements and it simply makes no difference to the Employer in this case, that the calculation be done out of residing in Nadi as opposed to Lautoka.

15. I find that the transfer of the Grievor has come about under the first category of case that has been identified above. The Tribunal finds that the Employee should not be required to physically locate to Lautoka, if she is more comfortable living in Nadi. After all, that is where her family are located. She has moved out of her point of recruitment and is now required to live in the geographical area of another duty station, so as to attend work. She should be entitled to the entitlements of the policy on that basis, as and from the effective date of transfer. The conduct of the Employer in relation to this Grievor has been punitive and deliberately designed to deprive her of the entitlement that she was otherwise receiving prior to her transfer in 2013. So as to determine this Grievance pertaining to Ms Daulali, I order that she be reimbursed the entitlements provided for under the Policy for the relevant period. Such calculations are to be made on the basis that the Grievor while domiciled in Nadi, has a duty location in Lautoka.

The Case of Ms Sera Samuta

16. The case of Ms Samuta is somewhat different. Firstly, this would appear to be a type of transfer that falls within the second category of case. It comes about as a result of a promotion. The Grievor had been recruited to Nadi and later transferred to Lautoka. Her point of recruitment was Nadi, even though she elected to live in Lautoka. She was advised within the Notice of Transfer dated 19 November 2014, that the housing allowance would not apply, as she had been residing in Lautoka. The Grievor in this case has not physically moved residence from one duty station to the other, in accordance with Item 5 of the Policy at Section 2. Had there been evidence of a physical move away from the point of recruitment in a manner similar to that of Ms Daulali, then again a different set of issues may have emerged. There is no movement of residence from the point of recruitment after promotion and on that basis the claim arising out of the complaint must fail.

The Case of Mr Colawai

17. In the case of Mr Colawai, his situation does not appear to be any different to that of Ms Samuta. In this case, his point of recruitment was Lautoka, though he chose to live in Nadi. He was subsequently transferred to Nadi in 2013. His claim is that he should be entitled to the allowances under the Policy by virtue of his post being a different location from that of his initial appointment. Mr Colawai's transfer is one that also falls within the second category of case. In the Tribunal's view, he too is not entitled to qualify for the allowances paid, as he has not moved residence from one duty station to the other following his appointment, so as to qualify for an entitlement.¹³ There is no justification to make a payment where there has been no movement post the appointment of the officer.

¹² At least based on this factual scenario.

¹³ See Item 5 of the Policy at Section 2.


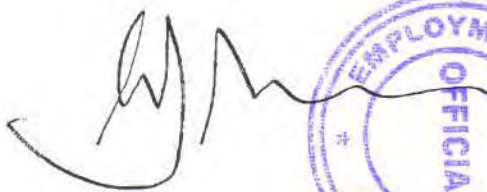
Conclusions

18. The existing Policy is written in a way that is unclear. The Grievors have identified anomalies in the case of other officers that they say have been receiving benefits, in similar case scenarios. Even if that was to be established, there is no justification for the sake of equity, to follow suit and continue to misapply the purpose of the Policy. I am advised by the parties that the Policy is being reviewed. That can only be a good thing. The Tribunal is not being asked what should be done in the case where the existing Policy has been misapplied or applied in a manner that was inconsistent. Obviously if there have been mistakes, the questions of over payment, unjust enrichment and change of position all come into play.
19. The Tribunal is very concerned with the possibility of 'change of position' and would recommend to the Employer, that if there is a need to now make adjustment to existing practice, that it be done in a manner that has regard to that concept, taking into account the mistake of fact or law (or the unified concept of 'mistake') that may have arisen in some cases. While the Tribunal initially alerted the Employer to the case of *Auckland Harbour Board v The King*¹⁴, it is likely, though I am not making any authoritative determination, that a Policy entitlement as opposed to a statutory entitlement may be distinguishable on that basis.

Decision

20. It is the decision of this Tribunal that:-

- (i) In the case of Ms Daulali, that she be entitled to the benefits available under the HR Policy 05/2012 *Transfer & Housing Policy & Procedures*, as and from 2 February 2015.
- (ii) In the case of Ms Samuta and Mr Colawai, no such entitlements arise, on the basis that neither party had relocated away from their residence, following their appointment to a new station of duty.



Mr Andrew J See
Resident Magistrate

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[1924] AC 319