



Interlocutory Decision

Title of Matter: Viva Panapasa Simote (Applicant)
v
Methodist Church of Fiji (Employer)

Section: Section 235(2) *Employment Relations Act 2007*

Subject: Power to Amend a Defect in Proceedings

Matter Number: Miscellaneous Application No 24 of 2017

Appearances: Mr S Valenitabua, Toganivalu & Valenitabua, for
the Trustees of the Republic of Fiji of the Methodist Church in Fiji
Mr E Batiweti and Mr N Tofinga (Pro Bono) for the Applicant

Date of Hearing: 9 August 2018

Before: Mr Andrew J See, Resident Magistrate

Date of Decision: 13 August 2018

KEYWORDS: Section 235(b) *Employment Relations Act 2007*; *Religious Bodies Registration Act 1881*; *Correction of Defect in Proceedings*; Section 192(f) *Employment Relations Act 2007*; *Charitable Trusts Act 1945*.

Background

[1] On 23 March 2018, the Applicant commenced proceedings by way of an *Ex Parte Notice of Motion*, against the 'Methodist Church in Fiji'. The Orders and Relief sought were as follows:-

- (a) That the Tribunal acknowledge that there is a legitimate Employment Grievance claim on foot in ME/MS-2/SUV/48/2018 in relation to non-appointment of the Grievor for one year without pay.
- (b) That the Tribunal require the Methodist Church of Fiji to cease and desist from attempting to evict the Applicant from her residential quarters at least until such time her Grievance that is on foot vide ME/MS-2/SUV/48/2018 has been resolved.

- (c) That leave be granted for the Motion within a day.
- (d) That any error or defect in this Motion be waived.
- (e) Any other Orders or Relied deemed appropriate in the circumstances.
- (f) Costs against the Employer.

[2] An *Affidavit in Support of the Notice of Motion* was filed by the Applicant who in effect attested to the fact that:-

- (a) On or about August 1995, that she had been accepted into the clergy of the Methodist Church religious body, as a Minister.
- (b) On or around January 2015, she was posted by that church body to minister at a local congregation referred to as the Dudley Circuit and was paid a monthly wage and had monies paid by the church into a Fiji National Provident Fund (FNPF) Account on her behalf.
- (c) On 18 December 2017, she was advised that “(she was) relieved of (her) appointment in Dudley Circuit and given one year without appointment for (her) to reflect on (her) obedience to the call of ordained Ministry”.
- (d) On 29 January 2018, the Applicant lodged an employment grievance with the Mediation Service alleging that she had been unfairly terminated in her employment.
- (e) A mediation activity commenced under the auspice of the Mediation Service on 22 February 2018, after which time the process was adjourned to allow the parties an opportunity to explore means of resolving the grievance.
- (f) On or around 20 March 2018, she was issued with a Notice to Vacate or Quit (an Eviction Notice) signed by Mr Valenitabua on behalf of the “*Trustees for the Republic of Fiji for the Methodist Church in Fiji*”¹.

[3] Because of the nature of the relief being sought, particularly given the Applicant had been deprived of income for several months and was being asked to leave her residential home, this Tribunal issued temporary Orders prior to convening a conference of the parties on 4 May 2018. As the Tribunal made clear at the time of issuing the Orders, it was of the belief that there was a prima face case established that there had been an employment relationship in place and if that meant that the Applicant’s accommodation was provided as part of the employment contract, that such issues should attempt to be resolved as soon as possible².

¹ Note even within the Eviction Notice, the citation of the name of the Trustees occurs in different ways

² There are logical reasons to determine such matters expeditiously from both the employer and employee’s perspective.

Conference 4 May 2018

- [4] A Conference in this matter was called before the Tribunal on 4 May 2018. It is a matter of record that on this occasion Mr Valenitabua of Counsel entered his appearance, by indicating that “(he) appear(ed) for the Employer”³. During this time, while a preliminary canvassing of the issues was undertaken so as to understand the nature of the arguments being advanced by both Advocates, directions were subsequently issued in order that the substantive matters could be addressed. These present proceedings arise out of the submissions filed by the parties, particularly having regard to the threshold issue raised (presumably by the Respondent Trustees) that the ‘Methodist Church of Fiji’ was not the employing entity and on that basis, the Applicant could not agitate her grievances before this Tribunal.
- [5] After several attempts to have this threshold issue argued, the matter ultimately came before the Tribunal on 9 August 2018, at which time both parties were given an opportunity to clarify their submissions.

The Case of the Applicant

- [6] Mr Batiweti on behalf of the Applicant, submits that the Tribunal has the capacity to correct any defect in proceedings by virtue of Section 235(b) of the *Employment Relations Act 2007*.
- [7] For the sake of convenience, Section 235 of the Act, is set out in its entirety as follows:-

In order to enable the Court or the Tribunal to dispose of a matter effectively, the Court or the Tribunal may, at any stage of the proceedings, on its own motion or upon application, and upon terms as it thinks fit, by order—

(a) direct parties to be joined or struck out;

(b) amend or waive an error or defect in the proceedings;

(c) subject to this Act, extend the time within which anything is to be done or may be done; or

(d) generally give directions as are deemed necessary or expedient in the circumstances.

- [8] The arguments advanced by the Applicant suggest that even if the Respondent Employer is not accurately named in the initiating documentation, that there is nonetheless a power of this Tribunal to correct such a defect, consistent with the objects of the Act, specifically those set out within Part 20. In support of this interpretation for how and why the powers should allow for such a thing to take place, Mr Batiweti has referred the Tribunal to Section 192(f) of the *Employment Relations Act 2007*, where it states that the procedures within the Act have been established recognising that judicial intervention needs to be that of a decision making body that is not inhibited by strict procedural requirements.
- [9] The essential thrust of the Applicant’s argument, is that an employment relationship between the Applicant and Respondent is in place and whether that be against the religious body known as the ‘Methodist Church of Fiji’, ‘the Methodist Church of the Republic of Fiji’, or the

³ As will be later made apparent, this is quite an interesting pronouncement, given that during the course of the conference, Counsel also claimed that no employment relationship existed.

Trustees on behalf of that religious body⁴, that the issues in dispute can and should be dealt with by this Tribunal through the exercise of its powers.

The Case of the Trustees

- [10] The argument that is being made (presumably) by the Trustees on behalf of the 'Methodist Church', is based on the fact that the Applicant has not identified the correct parties, when commencing proceedings. In this regard, Counsel relies on the language of Section 2 of the *Religious Bodies Registration Act 1881*, where it states:-

All suits and proceedings at law instituted or brought by or against any religious body shall be instituted or brought by or against the persons registered as hereinafter provided as trustees for the time being of such religious body and any such suit or proceeding shall be carried to its final termination notwithstanding any alteration in the registered trustees of such religious body while such suit or proceeding is pending.

- [11] In his oral submissions, Mr Valenitabua argues that as the party named in proceedings does not conform with the requirement at Section 2 of the *Religious Bodies Registration Act*, that the error cannot be corrected by the Tribunal. According to the Respondent, this position holds true despite the language of Section 235(b) of the *Employment Relations Act*, where it would otherwise give the Tribunal the power to amend or waive an error or defect in proceedings. To support his argument, Mr Valenitabua told the Tribunal that he relies on the decision of *The Trustees of the Republic of Fiji of the Methodist Church in Fiji & Koroi v Vonu & Vura*⁵, to justify the position that the proceedings should be withdrawn and fresh proceedings instituted.

The Analysis of the Law

- [12] The Tribunal is of the view that this is a rather disingenuous attempt by the Trustees or the church body, to prevent having the issues pertaining to the Applicant, dealt with in an expeditious and fair manner. Further, the Tribunal is satisfied that it has the power to correct the defect in proceedings by virtue of Section 235(b) of the *Employment Relations Act 2007* and sees no statutory block in doing so, regardless of Section 2 of the *Religious Bodies Registration Act 1881*.
- [13] Whilst Mr Valenitabua makes much of the decision in *The Trustees of the Republic of Fiji of the Methodist Church in Fiji & Koroi v Vonu & Vura*⁶, there is nothing within that decision that would appear to make any material difference to the present matter. Firstly and probably most importantly, the Court of Appeal held on that occasion, where 'the Methodist Church of Fiji' had been held liable for the conduct of two of its preachers who had caused damage to the house and chattels of a father and son at Nacavanadi Village, :

"That an incorrect description of a party could not have defeated an action".

⁴ This could include the Trustees on behalf of an incorporated body for the purposes of the *Charitable Trusts Act 1945*.

⁵ [2017] FJCA 12; ABU0041.2014 (23 February 2017)

⁶ Op cit at [17] to [21],

[14] Secondly, in the Court of Appeals decision, it was the case that despite the fact that the First Appellants being the trustees, did not have locus standi, it was still prepared to hear their arguments, even against a further backdrop where the Second Appellant, was a person deceased at the time of appeal and not one who would have had the direct right of appeal against the lower court decision, by virtue of his conduct, in any event⁷. More tellingly the Court of Appeal noted within its decision,⁸ that “Counsel was heard to concede that he was appearing for ‘the church’ (rather than the Trustees) which he complained had been wrongly described”.

[15] It is clear that within that decision, that Mr Valenitabua acknowledged that the entity in existence, is “the Methodist Church of the Republic of Fiji”. That is, this is the religious body for the purposes of gaining registration under the *Religious Bodies Registration Act 1881*. The fact that Section 2 of that Act, requires that “all suits and proceedings at law instituted or brought by or against any religious body shall be instituted or brought by or against the persons registered as ... trustees”, does not alter the fact that the religious body is the Methodist Church of the Republic of Fiji. Interestingly, up to this point in time, in furtherance of its arguments, the religious body has failed to provide a copy of its Trust Deed in order that the relationship between the church and its trustees and the power that it vests within them, is clearly understood. Certainly outside of the status given to Trustees at Section 2 of the *Religious Bodies Registration Act 1881* and the manner by which grants and transfers of land are dealt with at Sections 5 to 7 of the Act, there is nothing further provided within that statute that deals with the other powers and responsibilities of the Trustees when administering the church’s operations. For example, it may be the case and it is certainly unclear at this juncture, that the Constitution of the Methodist Church of the Republic of Fiji prescribes the roles and powers of the Trustees and makes provision for them by way of Trust Deed, but in the absence of being provided with such a document, such a conclusion cannot be precisely drawn. Further, Section 3 of the *Charitable Trusts Act 1945*, provides for the incorporation of Trust Boards where it states:

It shall be lawful for the trustees or trustee for the time being of any charity for religious, educational, literary, scientific, or charitable purposes, to apply to the Registrar for a certificate of registration of the trustees of any such charity as a corporate body; and if the Registrar having regard to the extent, nature and objects, and other circumstances of the charity, shall consider such incorporation expedient, he may grant such certificate accordingly, subject to such conditions or directions as he shall think fit to insert in such certificate relating to the qualification and number of trustees, their tenure or avoidance of office, the mode of appointing new trustees, and the custody and use of the common seal; and thereupon the said society or trustees shall become a body corporate under the name set forth in the certificate.

⁷ That is, that reliant on the argument of Mr Valenitabua, that neither of the Appellants would have had standing.

⁸ At [18].

- [16] In that case, there would be a capacity for a corporate body established to enter into employment contracts, in accordance with Section 10 of that Act. Yet again, no such information to that effect is presently before the Tribunal.
- [17] For the moment then, those issues remain on the back burner. What exists before the Tribunal at the present time, is whether or not, consistent with Section 235(b) of the *Employment Relations Act 2007* and Section 2 of the *Religious Bodies Registration Act 1881*, that this Tribunal can correct the named party to proceedings. A correction would enable the Tribunal to examine in more detail the Motion that has been brought before it that deals with the ostensible termination of employment of the Applicant and the efforts made by the religious body to have her evicted from the residence that she calls her home.
- [18] Having said all that, it is important to note, that the Court of Appeal within its decision, recognised the historical practice in Fiji, where insufficient regard was being given to this formal requirement where cases involved the 'Methodist Church' and stated that "*in future litigation, the proper procedure ought to be followed.*" As was made clear to parties in these current proceedings, this Tribunal fully embraces that direction. What it does not embrace, are the efforts by this particular religious body, albeit ostensibly through its Counsel on behalf of its Trustees, to deliberately attempt to place obstacles in the Applicant's path, in order that her grievance can be promptly resolved. After all, one can only assume that the Trustees are acting on behalf of and by direction of the religious body and not in their own right. If a Board of Trustees has been incorporated, then the combined effect of the *Religious Bodies Registration Act 1881* and the *Charitable Trusts Act 1945* would likely result in the incorporated body being sued⁹. The incorporated body in effect being the named party to proceedings.

Practical Consequences of Allow for Correct of Name of Parties

- [19] As the Tribunal indicated to the parties, the more important issue from a practical purpose and having regard to the principles of fairness enshrined within the employment relations law, would be to ask the question, what should happen if the correction was allowed to occur? Unfortunately and somewhat demonstrably of the position taken by Counsel in this matter, the response to such question was in effect, "that we would appeal the decision". What the question sought to ascertain was, would the newly named Respondents on behalf of that same religious body¹⁰, need a further opportunity to replead their case.
- [20] The Tribunal allows for the correction of the Respondent's name to be made consistent with the requirements of Section 2 of the *Religious Bodies Registration Act 1881*. If the Board of Trustees are registered for incorporation under the *Charitable Trusts Act 1945*, then the Trustees who are Respondent to this grievance are a body corporate. If not, the individual Trustees of the Republic of Fiji of the Methodist Church in Fiji, become parties to these proceedings.

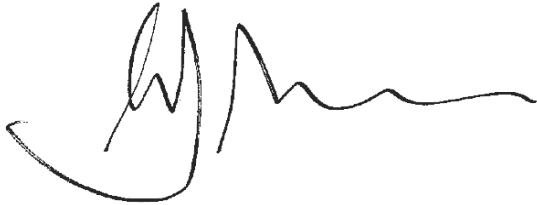
⁹ This would presumably be the effect of the certificate of registration of the trustees of any such charity as a corporate body, consistent with Section 3 of the *Charitable Trusts Act 1945*.

¹⁰ Even if it was slightly incorrectly named.

Decision

It is the decision of this Tribunal that: -

- (i) Leave be granted to the Applicant to amend the Notice of Motion, by substituting the name of the 'Methodist Church of Fiji' and replacing it with the 'Trustees of the Republic of Fiji of the Methodist Church in Fiji.'
- (ii) The matter be relisted for conference of the parties at a time and place to be notified by the Registry.



Mr Andrew J See
Resident Magistrate