

IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

ORIGINAL JURISDICTION

CASE NUMBER: ERCC NO. 11 OF 2013

BETWEEN: NATIONAL UNION OF FACTORY AND COMMERCIAL WORKERS

APPLICANT

AND: FRINCOS HIRE (FIJI) LIMITED

RESPONDENT

Appearances: Mr. D. Nair for the Appellant.

Mr. S. Nandan for the Respondent.

Date and Place of Judgment: Wednesday 12 March, 2014 at Suva.

Coram: The Hon. Justice Anjala Wati.

JUDGMENT

Catchwords:

Compliance Order-Unlawful lockout of the employees- are employees entitled to wages for the period of unemployment- do they have a statutory right to be paid the wages - can a meaningful order be issued for compliance- is mediation necessary before a compliance order application is filed in Court.

Legislation:

The Employment Relations Promulgation 2007 ("ERP"): ss. 24; 176; 177 (d); 179 (c) (iii); 182(1); 221(1).

The Cause

1. On 29 July 2013, the applicant filed a motion seeking compliance orders, in particular, that the respondent:
 - a. *complies with s.6 (6) of the ERP and desist from terminating the members of the applicant on grounds of joining the Union;*
 - b. *reinstate 52 employees who have been locked out of their employment effective from 29 July 2013;*
 - c. *In accordance with s.24 of the ERP, pay 52 employees their normal wages for the period of their non-employment due to the unlawful lockout by the respondent; and*
 - d. *desist from discriminating the members of the applicant on grounds of joining the union.*

Grounds in Support

2. In support of the application, the applicant filed an affidavit through the General Secretary Mr. John Mudaliar. Mr Mudaliar deposed that on or about 2 January 2013 about 52 employees of the respondent decided to join the National Union of Factory and Commercial Workers ("**NUFCW**").
3. The NUFCW is a duly registered trade union under the ERP. The names of the employees are:
 1. *Laitia Matalomani*
 2. *Paula Vale*
 3. *Epeli Ratu*
 4. *Ilaisa*
 5. *Vidya Wati*
 6. *Sairusi Ratusili*
 7. *Seremaia Koroinasau*

8. *Apenisa Balekece*
9. *Inoke Ratu*
10. *Taitusi Navunikaba*
11. *Jese Maimanuku*
12. *Edward Joseph Campbell*
13. *Jovilisi Tori*
14. *Peni Raiwalui*
15. *Taito Rokobiau*
16. *Sakenasa Vunimalolo*
17. *Jope Talemaibau*
18. *Lewai Cautatau Waqalevu*
19. *Josua Naitata Tuluga*
20. *Jone Lutumailagi*
21. *Usaia Koroitubuna*
22. *Christopher James*
23. *Saninivalati Leka*
24. *Josaia Salauca Tuouki*
25. *Epeli Qalo*
26. *Anare Naqau*
27. *Semisi Lagivala*
28. *Leeroy James Healty*
29. *Jimi Taura*
30. *Mouga Lutu*

31. *Keni Tekei*
32. *Manasa Lalaqila*
33. *Joape Macanawai*
34. *Atunaisa Cama*
35. *Ilaisa Cika*
36. *Waisale Raki Taito Tabua*
37. *Kameli Waqamate*
38. *Mosese Rabawara*
39. *Wilisoni Senikau*
40. *Esira Senikai*
41. *Peni Vadei*
42. *Setareki Tuirabe*
43. *Arthur Aporosa Vualiku*
44. *Kelepi Dainaki*
45. *Inoke Naituku*
46. *Apete Tuilovoni Vukakiwakaya*
47. *Lasarusa Bati Soqonakalou*
48. *Pio Sairusi*
49. *Aporosa Vualiku*
50. *Amena Tabuavula*
51. *Joji Oba*
52. *Kitione Utovou*

4. Upon joining the Union, the employees have been making manual subscription payments directly to the Union.
5. On 19 July 2013 the NUFCW wrote to the respondent to deduct their union subscription from the wages of the employees and remit the same to the NUFCW. The employees had authorised this deduction from their wages.
6. The respondent then started to threaten the employees to withdraw from the Union or else their employment will be terminated.
7. On 25 July 2013 the NUFCW again wrote to the respondent to desist from threatening the employees on the grounds that the employees had a right under s. 6(6) of the ERP to join a union.
8. On 29 July 2013 the respondent locked the members of the applicant from the employment and refused to allow them into the premises. The actions of the employer tantamounts to lock out that is stringently protected under ss. 176 and 177 of the ERP.

Grounds in Opposition

9. On 2 August 2013 and 15 November 2013 the respondent sought time to file an affidavit in reply but none was filed until the hearing date.

Submissions

10. Mr. Nair, appearing for the applicant, argued that he is only going to ask for compliance with the application that the employer pays the 52 employees their normal wages for the period of non-employment due to the unlawful lockout. The compliance is sought under s.24 of the ERP. Mr. Nair said that the other orders have been complied with and there is no need to seek compliance with those orders.
11. Mr. Nair also explained the circumstances in which the orders were complied with. He informed the Court that on 28 July 2013 the employer had threatened the union members that they will be locked out of the premises. The lockout took place on 29 July 2013. The

Union then filed the current case on 29 July 2013 and informed the registry of the urgency of the matter. The Court granted a date of 2 August 2013 at 9.30 am for hearing of the matter. The application was served on the employer on 29 July 2013.

12. After service of the application, the employer immediately called the employees back to work. The employees were thus only out of work for 5½ hours only. The employees have not been paid till date for the 5½ hours they were out of work for.
13. Mr. Nair argued that the statutory provisions for the lockout were not followed so the lockout was unlawful and the employees ought to be paid the monies for the period of non-employment.
14. Mr. Nandan argued that the problem in litigating for an order of the nature sought is that no meaningful order can be made. Any order that would be issued for compliance as sought in prayer c will lack specificity and will be bad in law. No enforceable or meaningful order can be made if the order is to be granted.
15. The second matter raised by Mr. Nandan was that this matter should be referred for mediation rather than issues of compliance orders.
16. Mr. Nandan argued that the application does not give sufficient particulars for it to respond to and that is inherently unfair to him. The affidavit of support is sparse too. Some facts were added to the affidavit by Mr. Nair. The affidavit does not indicate the actual hours of pay sought or the amount sought to be paid. That figure was tendered from the bar table. The term wages is generic. The application ought to have specified the period of unemployment or the amount of wages sought. The application also does not specify the names of the employees affected.
17. Mr. Nandan argued that if the applicant wishes to continue with the same application it can seek an amendment from the Court and specify what it exactly seeks from the Court. He will not object if such a step is taken by the applicant.
18. Mr. Nandan also argued that the applicant can also talk settlement with the employer and have this matter sorted out amicably.

The Law and Analysis

19. The Employment Court's power to issue compliance of a provision of the ERP is founded in S.221 (1) (a) of the ERP. The section reads:-

"221. – (1) If a person has not observed or complied with –

(a) a provision of this Promulgation; or...

The Court may, in addition to any other power it may exercise, by order require, in or in conjunction with any proceedings under this promulgation to which that person is a party, that person to do a specified thing, or to cease a specified activity, for the purpose of preventing further non-observance of or non-compliance with that provision, order, determination, direction, or requirement, and must specify time within which that order is to be obeyed".

20. It is not disputed by the respondent that the employees had been under a period of unemployment due to an unlawful lockout by the employer. The procedure to carry out a lockout is found in Part 18 of the ERP. That procedure, under the evidence before me, has not been followed.

21. If the lockout was lawful, I would not have had any powers to grant an order of compliance: s.179 (c) (iii):

"Lawful participation in a strike or lockout does not give rise for the grant of a compliance order."

22. Since the lockout took place in contravention of s.176, it is an unlawful lockout: s.177 (d) of the ERP.

23. S.176 states that *"no lockout shall take place unless the employer gives 28 written notice to the Permanent Secretary and the respective trade unions. A notice ... is valid for 6 months from the date of the notice."*

24. Since the lockout was unlawful for non-compliance with s. 176 of the ERP, a compliance order can issue. What is the nature of the compliance sought? Mr. Nair is asking for 5½

hours wages for each of the 52 employees which is the period of unemployment arising out of the lockout.

25. The employees are entitled to wages under s.24 and 182 (1) of the ERP. The ss. read:

“ 24. An employer must-

(a) unless the worker has broken his or her contract of service or the contract is frustrated or its performance prevented by an act of God, provide the worker with work in accordance with the contract during the period for which the contract is binding on a number of days equal to the number of working days expressly or impliedly provided for in the contract; and

(b) if the employer fails to provide work to the worker the employer, pay to the worker, in respect of every day on which the employer so fails, wages at the same rate as if the worker had performed a days work”.

“182 (1) The workers are not entitled to any remuneration in respect of the period of any lawful lockout except where the lockout is unlawful”

26. The employer was under an obligation to provide work to the 52 employees. It unlawfully locked them out and did not provide them work for 5 ½ hours. If it has not provided the employees with work, it is under a statutory duty to pay the employees their normal wages for the 5 ½ as if they had performed the work. If I were to order payment of 5½ hours wages to the 52 employees, I would in fact be ordering compliance with the above two provisions of the ERP which is perfectly within the powers I have under s. 221 (1) (a) of the ERP.

27. I will assess the objections raised by Mr. Nandan. He says that any orders that I would issue would lack specificity and would be bad in law for any enforceability. I do not agree with Mr. Nandan. If compliance order was to be issued for the employer to pay each employee 5½ hours of wages each then it is for the employer to calculate the 5½ hours wages for each employee. It is within the knowledge of the employer how much each employee is paid per hour. This would be easy to work out if the employees are

paid hourly and if not then easy to calculate by a simple division of daily wages by the number of hours each employee works in a day. The employer's accountants can carry out this task. I am sure they do more difficult mathematics than this.

28. Mr. Nandan's contention that the application is bad because it does not state the period of unemployment or the names of the employees is unsustainable.

29. Firstly, the affidavit in support has a list of the names of the employees affected. The application need not have individual names. The affidavit gives sufficient particulars about the employees. No further particulars are needed.

30. In respect of the omission in the application and the affidavit that the period of unemployment was 5½ hours, I say that that is not prejudicial to the employer's case. Firstly, it is within the employer's knowledge what the period of unemployment was for each employee. Secondly, the employer does not dispute that there was unemployment of 52 employees for unlawful lockout. Thirdly it was impossible for the applicant to have stated the period of unemployment at the time the application was filed. It was only after the filing and serving of the application that the employees were allowed back to work from the lockout. If Mr. Nandan wanted particulars he ought to have sought one from the applicant or the Court. If he did not seek that, he cannot argue that he did not have sufficient particulars to respond to the case.

31. Mr. Nandan also raised this issue that this matter ought to be sent for mediation. I cannot force this on the applicant given the nature of the application. It has a right to come to ERC for compliance orders and require a determination from the Court. The legislation gives them that right without having to go to mediation first.

32. On the above analysis, I find that a compliance order ought to be issued.

Final Orders

33. The employer has to pay each of the employees named in paragraph 3 of the judgment wages for 5½ hours being the period of their unemployment due to the unlawful lockout.

34. The payments must be made within 7 days and a schedule of such payment must be filed in Court within 24 hours of the payment.
35. I will adjourn this matter to another date which I shall appoint in consultation with counsel to monitor whether compliance has taken place or that the Court needs to deal with the failure under s. 221 (6) of the ERP.
36. The applicant shall have costs of this proceeding in the sum of \$750 to be paid within 21 days.

Anjala Wati

Judge

12.03. 2013

To:

1. *Mr. Nair for the Applicant.*
2. *Mr. Nandan for the Respondent.*
3. *File: ERCC 11 of 2013.*