IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

APPELLATE JURISDICTION

CASE NUMBER:	**ERCA NO. 2 OF 2012**
BETWEEN:	**NATIONAL UNION OF HOSPITALITY, CATERING AND TOURISM INDUSTRIES EMPLOYEES**
	APPELLANT
AND:	**TRADEWINDS HOTEL AND CONVENTION CENTRE**
	RESPONDENT
Appearances:	**Mr. N. Tofinga for the Appellant.**
	Mr. J. Apted and J. Cati for the Respondent.
Date and Place of Judgment:	**Monday 17 February 2014 at Suva.**
Coram:	**The Hon. Justice Anjala Wati.**

JUDGMENT

Catchwords:

Duty of employee to give details of dispute-if details are not given, the time the employer must raise objections on the dispute.

Redundancies under s. 107 of ERP- will s. 107 cover a temporary situation- statutory obligations of employer when exercising rights under s. 107 - Duty to provide work under s. 24 of the ERP-the duty extinguishes upon the employer exercising its rights under s. 107 of the ERP-Should the parties agree to redundancy-is there a need for an agreement.

Cases Referred To:

Fiji Bank and Finance Sector Employees Union v. ANZ [unreported] ERCA 01 of 2009.

Benmax v Austin Motor Company Ltd. (1955) 1 All ER 326.

Legislation:

The Employment Relations Promulgation 2007 ("ERP"): ss. 24, 107, 162.

The Cause

[1]. This is an appeal against both the orders of the Employment Relations Tribunal ***("ERT")***, the preliminary and the substantive. The cause before the ERT was a dispute reported by the Union on behalf of its members for unlawful termination of 9 employees. The terms of reference before the ERT read:

" National Union of Hospitality, Catering and Tourism Industries Employees and Tradewinds Hotel and Convention Centre.

Regarding the termination of Alan Tokotokoca, Rusila Veiliutaki, Emele M. Seru, Ahmed Mutar, Lorima Biu, Solome Vateitei, Susana Racava, Ani Saukelo and Meli Koroitamana.

The Union submits that all workers be reinstated to their respective positions and all remunerations paid".

[2]. The appellant appeals against the substantive orders which dismissed the appellant's case for unlawful termination of 9 employees.

[3]. The respondent cross-appeals against the decision of the of the ERT when it declined to strike out the dispute on the ground that it did not give the employer sufficient details of the dispute to prepare for the hearing despite upholding the respondent's argument that the dispute lacked any particulars and that it was essential for the employee to give the employer a fair outline of the grievance or dispute which will be raised against the employer at the hearing to enable the employer to prepare for the hearing.

[4]. The appeal relates to the verdict on the substantive cause and the cross appeal relates to the outcome of the preliminary argument. I will deal with the appeal first.

The Relevant Facts

[5]. The relevant background facts, as found by the ERT at paragraph 7.10 of its judgment, are as follows:-

1. *"The Hotel was previously owned and operated by Mr. Reginald Raffle under the trading name "Raffles Tradewinds Hotel & Convention Centre" ("Raffles Tradewinds").*

2. *The 9 workers, who are the subject of this Dispute, were originally employed in various capacities by Mr. Raffe trading under the Raffles Tradewinds name.*

3. *There was a collective agreement in existence between the Union and Raffles Tradewinds Hotel.*

4. *On about 14 August 2007, Mr. Raffe entered into a sale and purchase agreement ("the S & P Agreement") with Pandey, for the sale of the Hotel business and the land. The S & P Agreement entitled Pandey to use the business name "Tradewinds Hotel & Convention Centre" (without the word "Raffles") for 12 months after settlement.*

5. *Pandey's plans for the hotel were to extensively renovate and refurbish the Hotel to upgrade it to an international 4 star standard and re-brand it as a Novotel hotel. The "Novotel" brand is an internationally renowned 4 star hotel brand owned by ACCOR.*

6. *Use of the Novotel brand requires a hotel property owner to enter into a management agreement with ACCOR and to have facilities and guest service of the 4 star-standard which the international market associates with the Novotel brand. Travellers expect hotels operating under the Novotel brand to have facilities and guest service of that standard.*

7. *Raffles Tradewinds was in many areas an outdated property. It also had not operated as a 4 star hotel and its facilities and the service standards it provided were not of the Novotel 4 star standard. The evidence was that it was a 2 star economy operation. Pandey's plan necessarily meant extensive renovations, and the modernisation and upgrading of facilities. The adoption of the Novotel brand also required the considerable upgrading of service standards provided by all staff and a complete change in the "image" of the Hotel with new management methods and staffing structures in line with the Novotel system.*

8. *The 12 month period during which Pandey traded under the Tradewinds name was to allow it to renovate and refurbish, raise facilities and service standards , through training, to a 4 star level and change the image and staffing structures before re-branding and re launching the Hotel as a Novotel.*

9. *During the refurbishment period, large parts of the Hotel – both in terms of room and public areas – had to be closed, and therefore guest numbers and service offered to guests and the public were also to be reduced.*

10. *With fewer guests and services, the need for staff would also be reduced. Importantly with reduced operations and income, it was not economically viable to keep all existing staff employed on the same employment conditions.*

11. *In March 2008, before Pandey got legal title and took possession of the Hotel, ACCOR representatives took steps to negotiate a new transitional collective agreement with the Union on behalf of Pandey as the collective agreement between the Union and Mr. Raffe would no longer apply after the settlement. The old collective agreement could not apply as the new owner of the hotel, Pandey, was a different legal person to the business that had signed the old collective agreement with the Union.*

12. *The Union and the hotel staff including the 9 workers were advised from the outset of Pandey's plans for re-branding and upgrading. In negotiations, Pandey wanted the new collective agreement to allow for special transitional arrangements given the reduced needs of the hotel for the 12 month period during which it was to be upgraded.*

13. *At this time, some staff at the Hotel were already working reduced hours as a result of the difficulties that were being experienced by the tourism industry following the 2006 coup and he Global Financial Crisis. One of ACCOR'S specific objectives during these negotiations was to try to achieve agreement on further reduced hours of work for all staff to ensure that the considerably smaller amount of work during the upgrading was shared among as many workers as possible so that maximum employment could be maintained.*

14. *These transitional agreement negotiations were not concluded before Pandey and ACCOR took over the Hotel on 9th April 2008. On that date, Pandey became the owner of the Tradewinds property and business, and commenced operation under the new shorter name "Tradewinds Hotel & Convention Centre".*

15. *Each of the 9 Workers' employment with Mr. Raffe was terminated and they were paid their redundancy entitlements by Mr. Raffe. They were re-employed by Pandey with effect from, 9 April 2008 under fresh contracts. This re-employment was because Pandey was a different legal person to their former employer.*

16. *Pandey provided each worker with brief written contracts containing particulars of their conditions. Some of the Workers signed and returned them, while others did not. Some only completed their Personal Data forms. Evidence indicated that some members were not to sign these as they were to be covered by the new collective agreement as advised by the Union.*

17. *Each of the 9 workers entered a fresh written or oral contract of service with Pandey from 9 April 2008 and their period of service is to be calculated from that date.*

18. *Negotiations between the Union and ACCOR over a new collective agreement continued over April and May 2008 with various meetings postponed because of Union commitments. ACCOR were not, however, able to reach a new collective agreement before the end of May 2008.*

19. *During these negotiations, the Union and staff themselves would not agree to further reduced hours, and instead were pushing to increase hours for staff. ACCOR had also proposed multi-tasking to maintain employment but its members declined. Exchange of emails dated 25 April 2008 and 29 April 2008 (Exhibit No. 1) appears to confirm this position.*

20. *In the meantime, the principal shareholder in Pandey, a New Zealand resident, visited and inspected the Tradewinds property on 20 May 2008. He noted the existing poor condition of the property, and that a great deal of work needed to be done to upgrade it to the necessary standards and image.*

21. *Since there were only 10 months remaining during which Pandey was authorised to trade as "Tradewinds", he decided that renovations should begin immediately. The Hotel had 108 rooms available. The planned refurbishment necessitated the closure of 64 (or 61%) of the Hotel's guest rooms, leaving only 44 out of 108 rooms (39%) in service. It also necessitated the closure of the Hotel's bar area and the reduction in the services of its restaurant. Up until the renovations, the bar had been a full bar with a lounge area servicing guests and the general public. The renovation involved the closure, demolition and replacement of the bar.*

22. *Although the restaurant was to remain open to cater for the considerably reduced number of guest rooms, it was to be slightly smaller in size and was to offer much reduced services.*

23. *As a necessary result of the whole refurbishment and the reduction of business by 61%, the number of staff needed in various areas of the Hotel's operations was reduced.*

24. *Furthermore, with reduced operations and expected income, it was just not economically viable to maintain the existing staff cost.*

25. *Since the Union and the Workers had not agreed to further reductions in hours, this meant that the necessary reduction in staff cost could only be achieved through redundancy. This was regarded by the Union as the proposed alternative at the time under s107 and s108 of the ERP".*

Findings of the ERT: Re: The Substantive Cause

[6]. The ERT found that the Union did not challenge the employer's reasons for redundancies or exercise its rights to more information. It did not propose any alternative to redundancies.

[7]. The ERT accepted the Employer's submission that the statement of ***Cook J (later Lord Cooke)*** in ***GN Hale & Son Ltd. v Wellington etc, Caretakers, etc IUW [1991] 1 NZLR 151***, should be applied in that the genuineness of an employer's commercial reasons for redundancy may be examined by the Court but the adequacy of those reasons is a matter for the employer's judgment. The ERT should not second-guess and substitute its own reasons.

[8]. It found that even a *"temporary"* economic reason is sufficient justification for a termination for redundancy and that the employer had genuine economic and structural reasons for the redundancies as required by s.107 of the ERP.

[9]. After careful consideration of all the evidence, including the oral evidence of Mr. Urai of the Union and Mr. Townsend of the Employer, the ERT found that the Union had agreed in fact to the redundancies and to a process for implementing them on

behalf of its members. There was no written agreement but under s. 107 there was no necessity for a written agreement.

[10]. The ERT found that the Union had acted in bad faith in agreeing to the termination of the 9 employees and participating in its implementation through attendance at the Employer's Hotel at its own request to hand out termination letters but then reporting a dispute over the matter and denying before the Tribunal that there was any agreement.

[11]. The ERT accepted the Employer's submission that the Union was estopped from reporting a dispute over the matter.

The Grounds of Appeal

[12]. Aggrieved at the decision, the appellant raised the following grounds of appeal:

1. ***That the Learned Legal Tribunal erred in law and in fact in holding that the union cannot challenge and seek redress for something that it actively negotiated on behalf of its members and is now stopped from doing so.***

2. ***That the Learned Legal Tribunal erred in law and in fact in holding that the members cannot claim remedy of reinstatement or any payment in part or full for loss of employment as the Tribunal did not find the termination unlawful or unfair.***

3. ***That the Learned Legal Tribunal erred in law and in fact in holding that the termination of the 9 aggrieved members were not unlawful and unfair.***

4. ***That the Learned Legal Tribunal erred in law and in fact in holding that the provisions of s. 107 of the ERP were properly invoked and the termination of the 9 aggrieved members were made fairly and lawfully by the respondent.***

5. ***That the Learned Legal Tribunal erred in law and in fact in holding that the provisions of s.107 of the ERP were properly invoked and the termination of the 9 aggrieved members were made fairly and lawfully by the respondent without legitimate justification.***

6. ***That the Learned Legal Tribunal erred in law and in fact in not preferring and upholding the appellants submission that the respondent had breached s.24 of the ERP when it terminated the 9 aggrieved members given that the surplus staffing situation was a temporary one.***

[13]. At the hearing the appellant indicated that it will only require the ERC to determine one issue which would effectively cover all his grounds of appeal. The issue being *whether the employer could terminate the employment of the said 9 employees pursuant to s.107 on the basis of a temporary surplus staffing situation.*

Appellant's Submissions

[14]. The first argument of Mr. Tofinga was on s. 24 of the ERP. He stated that s. 24 reads:

"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".

Mr. Tofinga submitted that when Pandey bought the hotel, refurbishment and temporary staffing situation was foreseeable as the hotel was bought with the intention to renovate and upgrade it from a 2 star to a 4 star in status. Renovations and refurbishments are not an act of God and as such the employer was under a duty to provide work to the 9 terminated employees.

[15]. Mr. Tofinga submitted that when he raised this argument under s. 24 of the ERP the ERT erred in choosing not to seriously consider this legal argument but instead chose to find that the union had agreed to the termination and the process of carrying out the said termination and therefore were stopped from challenging the decision further. The ERT should have considered this argument, contended Mr. Tofinga, as both the employer and the ERT were well aware that the union will rely on s. 24 to argue its case. This position of the Union was clear to both the ERT and the employer before the hearing proper commenced.

[16]. The second argument of Mr. Tofinga was under s.107 of the ERP. Mr. Tofinga submitted that initially the employer had offered to retain the employees provided they work reduced hours that is 20 hours per week. When the Union did not agree the termination was carried out. The question was not whether or not the Union agreed but whether their termination under s.107 was justified. The reasons for carrying out the redundancy were temporary surplus staffing. S.107 does not cover a temporary staffing situation. It covers permanent surplus staffing situation only. The situation at hand did not warrant the termination under s.107. To uphold the argument that temporary situations could be covered under s.107, would no doubt see the opening of floodgates by unscrupulous employers who would terminate whomever they may seek to victimise by simply creating a temporary staffing situation and terminate under the disguise of redundancy. To justify termination by redundancy the employer contemplating redundancy must first of all prove that the reason why the work is no longer needed at work is because his position is no longer needed at all. The definition of redundancy supports this argument says Mr. Tofinga.

[17]. Mr. Tofinga argued that the definition of redundancy means *"no longer needed at work for reasons external to a workers performance or conduct…"* The words *"no longer needed at work"* means not needed at all so the situation of surplus staffing must be permanent.

[18]. The third argument is in relation to the ERT's decision that it is not a requirement under the ERP that there be negotiations in respect of redundancy and that any agreement upon it must be in writing. Mr. Tofinga argued that under s.162 of the

ERP, a collective agreement has no effect unless it is in writing, signed by the union and employer being the parties to the agreement, and registered by the registrar.

[19]. Mr. Tofinga stated that it was the Union's position that it never agreed to any staff being made permanently redundant but if there was any such agreement it had no effect and should not have been enforced considering the requirement of s.162 of the ERP.

[20]. The final argument of Mr. Tofinga centred around s.77 of the ERP. He argued that under s.77 (3) of the ERP, it was for the employer to prove that the termination of the employees were not occasioned by them having been involved in the activities of a union within 12 months before their termination. Mr. Tofinga argued that the General Secretary of the appellant gave evidence that at the end of the day only his executive committee members at the Hotel were the ones selected and affected by redundancy. The ERT ought to have then determined whether or not the employer complied with this statutory obligation after it was intimated by the Union that only his Union executives were being affected rather than dwelling on whether or not there was an agreement between the parties.

Respondent's Submissions

[21]. Mr. Apted argued that the closure and reduction in work was required for over a period of 10 months. That period cannot be classified as temporary. Neither the common law nor the ERP obliges an employer to continue employment and pay workers for 10 months when there is no work for them and it is not economically viable to maintain their employment.

[22]. Mr. Apted said that whilst the Court may inquire into whether there was a genuine redundancy (and not a dismissal for other reasons disguised as a redundancy), the adequacy of the employer's commercial reasons is for the employer. This principle, argued Mr. Apted, is not affected by S.24 of the ERP.

[23]. S.24 applies so long as the contract is in force. S. 24 does not prevent termination of an employment contract, whether for redundancy or otherwise. It is subject to the

employer and the workers right to terminate the contract as provided for in the contract itself or under the ERP or the common law.

[24]. In respect of s.107, Mr. Apted argued that where there are economic, structural or technological reasons to consider termination, s. 107 imposes a duty to inform the employees of the prospective terminations and give all other relevant information and to allow the workers or their representatives *"an opportunity for consultation"*. It does not impose a duty to negotiate or to reach agreement with the workers or their representatives. It also does not require the employer to consult the workers or their representatives in every case. The obligation is to allow the workers or their representatives an opportunity for consultation. There is an obligation on the employer (if the workers or their representatives take the opportunity for consultation), to listen and consider in good faith anything that the workers or their representatives might raise, but not necessarily to agree. S. 107 does not say anything about temporary or permanent need. It refers to a worker no longer being needed for reasons external to conduct or performance of the worker. It recognises consistently with the ***GN Hale*** principle that this is a decision for the employer to make if it has genuine commercial, technological or structural reasons, and subject to the requirements of consultation.

[25]. On the question of whether the Union agreed to the redundancies and is now prevented from reporting the dispute, Mr. Apted submitted that although there was no written agreement, the ERT found on the evidence that the Union had agreed in fact to the redundancies. There is no basis for disturbing this finding of fact.

[26]. It was submitted that in light of this agreement, the ERT was correct in finding that the Union was acting in bad faith and was stopped from challenging the redundancies by way of a dispute.

[27]. Since the Union consented to the terminations, it must as a matter of fairness and public policy be stopped from challenging the terminations in a dispute. Good faith principles require employers to accept the authority of Unions to represent their members and prohibit an employer from second-guessing a Union and going directly to the members. If a Union were allowed to challenge matters to which it

had previously agreed, this would undermine the whole system of employer-union-worker relations. Employers would effectively not be able to reach any binding agreements or understanding with Unions over their members. There would be no finality to matters between Unions, workers and employers and the Tribunal would be continuously drawn into matters on which parties had previously agreed.

[28]. The Union had represented that the redundancies were agreed, the employer acted on that representation to its detriment, so the Union should not be permitted to resile from the position which it represented it was in agreement with.

The Law and Analysis: Re: Appeal.

[29]. The argument on appeal basically centred around whether the termination of the 9 employees under s. 107 of the ERP was substantially justified.

[30]. Mr. Tofinga says that a temporary shutdown or surplus staffing for 10 months is a temporary situation. He says that s.107 does not cover temporary situations so the termination of the 9 employees on the basis that there was surplus staffing was unlawful under s. 107 of the ERP.

[31]. S. 107 reads as follows:-

> ***"107. (1) If an employer contemplates termination of the employment by redundancy of workers for reasons of an economic, technological, structural or similar nature, the employer must—***
>
> ***(a) provide the workers, their representatives and the Permanent Secretary not less than 30 days before carrying out the terminations, with relevant information including the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out; and***
>
> ***(b) give the workers or their representatives, as early as possible, an opportunity for consultation on measures to be taken to avert or to minimize***

> ***the terminations and on measures to mitigate the adverse effects of any terminations on the workers concerned, such as action to attempt to find alternative employment or retraining.***
>
> ***(2) In this Part—***
> ***"economic" means maintained for profit;***
>
> ***"structural" means in relation to a company, corporation, business enterprise or workplace the manner in which such entity is organised, managed or administered;***
>
> ***"technological" means a matter concerning, or use of, technology or information technology".***

[32]. S.107 cannot in any way only cover permanent economical, structural or technological situation. If that were so then one cannot say that an economical problem with an employer would be permanent. In most cases, the problem is a temporary one. In any economical crisis s.107 can be invoked. After s.107 is invoked the economical crisis may go away. One cannot then in hindsight say that it was temporary and could not be invoked.

[33]. The definition of redundancy states that a worker is not needed at work. The use of the words *"at all"* is read into the meaning by Mr. Tofinga. If the workers are not needed for almost a year, it complies with the definition of redundancy that they are not needed. The employer thus cannot keep them at work and has to exercise its rights under s.107.

[34]. The duty to provide work under S.24 is so long as the contract persists. It ceases upon termination. So s.24 is clearly out of question in light of my finding that s.107 could be invoked by the employer as it did not have work for the employees for almost a year. S.24 was also a new allegation as found by ERT and not in any way disclosed to the employer to prepare its case.

[35]. Upon hearing the evidence, seeing the demeanour and deportment of the witnesses the ERT found that the Union had agreed to the redundancies and the process to

carry out the same which was that the Union had agreed to hand over the termination letters to its 9 employees. I have no reason to disturb that finding of fact. It is well-settled that an appellate Court will not easily disturb findings of fact especially if the Court below had heard oral evidence. ***Lord Reid in the House of Lords in Benmax v Austin Motor Company Ltd (1955) 1 All ER 326 at 328 and 329*** stated that:

"Apart from the cases where appeal is expressly limited to questions of law, an appellant is entitled to appeal against any finding of the trial judge, whether it be a finding of law, a finding of fact or a finding involving both law and fact. But the trial judge has seen and heard from the witnesses, whereas the appeal court is denied that advantage and only has before it a written transcript of their evidence. No one would seek to minimise the advantage enjoyed by the trial judge in determining any question whether a witness is, or is not, trying to tell what he believes to be the truth, and it is only in rare cases that an appeal court could be satisfied that the trial judge has reached a wrong decision about the credibility of a witness. But the advantage of seeing and hearing a witness goes beyond that. The trial judge may be led to a conclusion about the reliability of a witness's memory or his powers of observation by material not available to an appeal court. Evidence may read well in print but may be rightly discounted by the trial judge or, on the other hand, he may rightly attach importance to evidence which reads badly in print. Of course, the weight of the other evidence may be such as to show that the judge must have found a wrong impression, but an appeal court is, and should be, slow to reverse any finding which appears to be based on any such considerations".

[36]. In any event under s. 107 there does not have to be any agreement in writing. There has to be an opportunity for consultation and indisputably, upon evidence, I find there was consultation. The procedure under s.107 is thus satisfied in carrying out the redundancies.

[37]. The collective agreement does not apply to s.107. S.162 thus, which discusses the form and content of a collective agreement, is irrelevant to s.107. S.107 is used when terminations are carried out. S. 107 brings an end to the collective agreement. S. 162 is used when parties enter into an employment contract.

[38]. There are no merits in the substantive appeal.

The Grounds: Re: Cross- Appeal

[39]. The grounds of the cross appeal are:

1. ***The Learned Legal Tribunal erred in law in holding that the preliminary issue raised by the employer should have been raised and argued as a preliminary issue prior to the hearing of the substantive dispute.***

2. ***Further or alternatively, the Learned Legal Tribunal erred in law in holding in the alternative that the preliminary issue should have been raised and argued by way of judicial review of or challenge to the Permanent Secretary's decision to accept the Unions report of the dispute, and that the respondent was stopped from raising it at the hearing of the substantive dispute.***

The findings of the ERT: Re: Cross-Appeal

[40]. The argument of the appellant was upheld but the dispute was not struck out as sought by the respondent.

[41]. The Tribunal gave the following reasons:-

1. The details of the dispute must be explained, that is mandatory, but the matter had been heard and in the interest of justice a striking out would be prejudicial as the employer had been able to present its defence on the material point.

2. That the Tribunal had ordered particulars of the dispute to be provided to the employer. If the particulars were not provided by the Union as ordered by the ERT, Mr. Apted should not have agreed to a hearing date.

3. That I had found in my decision in ***Fiji Bank and Finance Sector Employees Union v. ANZ [unreported] ERCA 1 of 2009*** at page 6 that ***"if the Permanent Secretary submits a dispute for a resolution to the ERT, the ERT then is***

> ***under a statutory duty to consider the dispute. Such reference by the PS gives rise to the Tribunal's jurisdiction. If the employer did not challenge the acceptance of the dispute by the PS then it was not entitled to challenge the Tribunal's jurisdiction once the dispute was referred to by the PS by virtue of the fact that the Tribunal is empowered to adjudicate on all matters referred by the PS".***

I was quoted to have further stated at page 15 of the same decision that:

> ***"The PS accepted what he viewed was a dispute. If employer was unhappy with the PS's decision, then it should have pursued a public law remedy by way of judicial review within 3 months of the PS's decision. There is no right to appeal under the ERP where the PS accepts a dispute. Once the PS accepts the dispute it is deemed under the ERP to be an employment dispute"***.

The ERT applied the decision and said that when the dispute was accepted by the PS a judicial review could have been raised against the PS's decision.

4. The ERT also found that some information regarding the dispute could have been sought at the mediation level under Regulation 5(1) of the Employment Relations (Administration) Regulations 2008.

Respondent's Submissions: Re: Cross -Appeal

[42]. Mr. Apted submitted that the ERT erred in deciding against the employer on the preliminary issue. It was argued that the ERT had actually found that the Union had not met the ERP's requirements for reporting a dispute. It, however, misapplied this Court's decision in ***Fiji Public Service Association v. Fiji Institute of Technology [unreported] ERCC No. 6 of 2009*** and ***Fiji Bank and Finance Sector Employees Union v. ANZ Bank [unreported] ERCA 01 of 2009*** in deciding not to dismiss the dispute for that reason.

[43]. Mr. Apted argued that the ***Fiji Public Service Association*** decision was distinguishable. In that case, the Court held that while mandatory steps in the process of a "dispute" had not been followed the mistake was not the applicant's and

as there was no disadvantage to the parties, the Court would exercise its powers under section 235 of the ERP and waive "*the defect in the proceedings*".

[44]. In this case, the deficiency was entirely the fault of the appellant. Furthermore , the employer submits that that case and section 235 (b) cannot apply here because there are no "*proceedings*" on foot before the Tribunal since the originating action of reporting a "dispute" was not performed.

[45]. The passage relied on by ERT from the later decision of ***Fiji Bank and Finance Sector Employees Union v. ANZ Bank (supra***) in which the need to take an early challenge was referred to were not findings but a description of the arguments of the appellant in that case.

[46]. Indeed if, as found by the ERT, a "*dispute*" had not been reported, there was never any "*dispute*" at all for the ERT to adjudicate – whether or not it had been challenged earlier.

Appellant's Submissions: Re: Cross-Appeal

[47]. Mr. Tofinga argued that the ERT was correct in not striking out the dispute as it was already heard and the employer had the benefit of presenting its case. It was not prejudiced. The preliminary issue which goes to the root of the dispute should have been challenged earlier.

The Law and Analysis: Re: Cross-Appeal

[48]. I agree to the findings of the ERT except where she incorrectly applied one of my rulings in ***Fiji Bank and Finance Sector Employees Union (supra)***. The ERT had quoted the passages of my judgment to say that once the dispute is accepted she is obliged to consider the same and that an early challenge by judicial review to the PS's decision should have been made. The quotations from my judgment were not my findings. I had then summarized the argument of the parties and that clearly

appears in my judgment under the head "submissions". That was not the dicta. I set aside those parts of the decision but the other reasons and the verdict are upheld.

[49]. Although the Union had not explained or given the details of the dispute, a matter of this sort must not be argued on the trial date. These objections must be taken earlier than the trial. In this case the ERT had ordered particulars and Mr. Apted should have insisted on particulars of the dispute to be given rather than accepting the trial date. Further, the employer could present its case and if it could not, rebuttal evidence could have been brought. At a trial, a preliminary point of this nature ought to be discouraged. The employer should have addressed these matters immediately when the proceedings started by application for further or better particulars or interrogatories or striking out.

Final Orders

[50]. The appeal is dismissed.

[51]. The cross appeal is only allowed to the extent that paragraphs 6.3 to 6.6 of the decision is set aside. The other parts of the judgment are upheld and affirmed including the verdict.

[52]. I order costs in favour of the respondent in the sum of $1000, summarily assessed, to be paid within 21 days.

Anjala Wati

Judge

17.02.2014

To:

1. Mr. Tofinga for the appellant. 2. Mr. Apted for the respondent. 3. File: ERCA No.2 of 2012.