IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

APPELLATE/ORIGINAL JURISDICTION

CASE NUMBER: ***ERCA 19 of 2018* and *ERCC 20 of 2018***

BETWEEN: ***NASESE BUS COMPANY LIMITED***

APPELLANT

AND: ***TRANSPORT WORKERS UNION***

RESPONDENT

Appearances: *Mr. D. Nair for the Appellant.*

Mr. S. Naidu for the Respondent.

Date/Place of Judgment: *Thursday 25 March 2021.*

Coram: *Hon. Madam Justice Anjala Wati.*

JUDGMENT

A. Catchwords:

Employment Law — right of employees to join trade union – duty of employer to deduct union fees upon authority by employee – duty of employer to enter into collecting bargaining and not conduct itself in a manner to jeopardize that duty – right of employees to get wages statement.

B. Legislation:

1. ***Constitution of Fiji: s. 20.***
2. ***The Employment Relations Act 2007 ("ERA"): ss. 44; 221 (6); 212 (6)***

Cause

1. There are two matters before me. The first is the appeal and the second is compliance application filed by the Union. The appeal is by the employer against the decision of the Employment Relations Tribunal ***("ERT")*** of 23 July 2018 on its orders that:

   a. *The employer Nasese Bus Company Limited* ***("NBCL")*** *deducts union fees of its members and remits the same to Transport Worker Union* ***("TWU")****.*

   b. *NBCL is to enter into collective bargaining with TWU in accordance with Part 16 of the ERA.*

   c. *NBCL is to cease from issuing individual contracts to the union members. In the event of an employee who is a union member wishes to migrate to individual contract, the union must be consulted and the written consent of the employee obtained.*

   d. *If the employees so request, the NBCL must issue wages statement in accordance with s. 44(1) of the ERA.*

The Appeal

2. NBCL says that the ERT erred in fact and in law in:

   1. *Issuing the said decision based on affidavit material when the facts in question were in dispute.*

   2. *Allowing the application when the facts and validity of the union membership and the consent forms for the deduction of the union subscription was disputed.*

   3. *In ordering the appellant to enter into a collective agreement* ***("CA")*** *which is contrary to s. 150 of the ERA.*

4. *In ordering against the issuance of the individual contracts in the absence of any agreed CA registered with the Registrar of Trade Unions which is contrary to s. 37(1) (a) of the ERA.*

5. *In ordering compliance with s. 44(1) of the ERA in absence of any complaint filed by the workers or the Labour Officers.*

6. *In failing to determine the employer's striking out application filed in the proceedings.*

The Compliance Application by TWU

3. After the appeal was filed, TWU filed an application for compliance of the orders of the ERT. It is the contention of the TWU that NBCL has failed to comply with the first 3 orders of the ERT *(I have identified that in paragraph 1 of the judgment).*

Application before the ERT

4. The orders were granted on the application by the TWU. The TWU had filed an application in the ERT and sought the following orders:

   a. *That the employer be ordered to deduct the union fees and remit the same to TWU in accordance with s. 47(1) (b) of the ERA and individual authorities executed by them;*

   b. *That the employer enters into a collective bargaining to conclude a collective agreement* ***(" CA")*** *in accordance with Part 16 of the ERA;*

   c. *That the employer desists from issuing individual contracts to its members; and*

   d. *That the employer issues each worker with a wages statement in accordance with s. 44(1) of the ERA.*

5. The basis of the application at the ERT was that on 12 December 2017, the General Secretary of the TWU personally delivered to NBCL a letter together with union fee deduction authority forms from 50 employees of NBCL. These employees were the members of TWU.

6. TWU averred that the letter and the deductions authority forms were received by Mr. Jai Nendra Kumar who is the Managing Director. It was deposed that the Director gave a personal assurance that deductions will commence from that same week but that there was failure to make any deductions.

7. The TWU also stated that by an EMS courier, a CA was sent to the employer on 11 January 2018. The CA was for the purposes of negotiation. After that the TWU says that it received a letter from the NBCL. The letter was dated 17 January 2018 and stated that all employees in NBCL were on individual contracts and as such NBCL will not engage in any negotiations for a CA.

8. TWU says that it then responded on 23 January 2018 and brought to the attention of the NBCL Part 16 of the ERA. However around end of January 2018, TWU says that it was informed by some of its members that NBCL was giving them individual contracts of employment to sign. It then wrote to the employer on 20 January 2018 reminding it of the impending negotiation of the CA and that TWU had advised its members not to sign the individual contract of employment.

9. The TWU also complained that it was advised by its members that the employer was not issuing them with the wages statement contrary to s. 44(1) of the ERA.

10. The application for compliance was heard by the ERT on papers.

Analysis

11. The parties have agreed that since both the applications arise out of the same decision, it was convenient to hear both the applications together. If the appeal is successful, the compliance application will not pursue to the extent the appeal is allowed. If the appeal is dismissed, the court will then have to determine the compliance application. Consequently both the

applications were heard together. The judgment covers both the proceedings before me. It is therefore logical that the appeal be dealt with first.

A. *Was there a genuine dispute before the ERT that the matter could not be heard on affidavits?*

12. It was submitted by Mr. Nair that in the ERT, the TWU had sought an order for compliance of s. 47(1) (b) of the ERA to deduct the union fees and pay to the union. Mr. Nair stated that there was no substantive evidence before the ERT to prove proper authorization with correct particulars of the employees whose names appeared on the membership forms authorizing deduction.

13. NBCL argued that the names of the employees provided by TWU included some employees who were not even employed by the NBCL. Further, some members who had signed the form denied signing the same.

14. Since there was a serious dispute surrounding the authenticity of the information in the forms, the matter should have gone for an oral hearing rather than deciding it on papers. The question before the ERT was whether there was a proper authorization of the deduction by the employees.

15. I have seen the application filed in the ERT and all the materials filed pursuant to that application by both the parties. It is clear that the Mr. Kamlesh Kumar, the General Secretary of TWU had on 12 December 2017 personally delivered to the NBCL a letter together with the union fee deduction authority forms from 50 employees of the NBCL.

16. From the affidavit filed by the NBCL, I find that the only objection that was raised was that the list of names provided by the TWU also contained names of people who were not employed by NBCL. The NBCL does not at any stage in the affidavit material state which employees out of the 50 who had authorized the deduction were not in employment with NBCL.

17. NBCL does not say that these employees were never in employment. What it then amounts to is that when the list was received by NBCL, some of the employees were no longer in employment. The TWU had clearly explained its position that the list contained names of the employees who were employed by the respondent at the time they joined the union. It was averred that it was possible that with passage of time, some of the members may have moved on but many of them are still employed by the NBCL.

18. I do not find that there was any genuine dispute to resolve on the issue of who were the employees in question in respect of whom the deductions were to be made by the employer. NBCL should be well aware as to which named employees are no longer in employment. Their names should have been revealed to the ERT. The NBCL deliberately did not clarify this hoping to make the list of the names of employees contentious to find a foot to argue against the compliance application. The conduct is deplorable.

19. Further, even if the ERT had issued the compliance orders, there is no harm or prejudice caused to the NBCL. They can proceed to deduct the union fees in respect of the members who are employed and inform the TWU about the members who are no longer in employment.

20. Mr. Nair also informed the court that the list provided by the TWU lacks correct details of the employees. No particulars were provided to the ERT to this effect and any argument in the appellate court is neither supported by any evidence nor substantiated.

21. I must also express my concern at Mr. Nair's submissions that some of the employees have indicated that they have not signed the forms. This shows that NBCL has been trying to interfere and talk to the employees who have indicated that they have joined the union. This is improper conduct as the same can amount to interference and intimidation which impacts on the workers constitutional right.

22. Further, neither was there any evidence before the ERT nor is there any evidence before me to the effect that the employees have denied signing the authorization forms for deduction of

the union fees. There was therefore no conflict to resolve. Any submission to this effect is an afterthought to justify the refusal by NBCL to comply with the orders of the ERT.

B. Does the order for the NBCL to enter into a collective bargaining contravene s. 150 of the ERA?

23. On ground 3 Mr. Nair argued that the orders of the ERT imposes on the NBCL to enter into bargaining when s. 150 of the ERA states that the duty of good faith does not require a union and an employer bargaining for a collective agreement to agree on any matters for inclusion or to enter into a collective agreement.

24. I find that Mr. Nair does not understand the effect of the order issued by the ERT. What the ERT had ordered was for the parties to undertake the task of collective bargaining. It has not ordered the NBCL to enter into a CA. There is a big difference in the two matters.

25. I do not understand why the NBCL is shying away from bargaining on the CA. It is important to note that the ERT had made observations about how the NBCL had given assurance in ERT Miscellaneous Application Number. 63 of 2017 that it would engage in collective bargaining. When the draft CA was sent to NBCL, it responded by saying that it will not enter into any negotiation as the employees have individual contracts.

26. The ERT found that the employer's act was an affront to the principles of good faith and that the act of issuing individual contracts calculated to frustrate the negotiation process.

27. I do not see the matter any differently from the ERT. I also concur with the ERT's findings that s. 20 (2) of the Constitution of Fiji clearly states that the workers have a right to form or join a trade union, and participate in its activities and programmes. Subsection 4 goes onto state that the trade unions and the employers have a right to bargain collectively.

28. NBCL has not shown any interest to comply with the constitutional rights of the workers. Its attempt is to frustrate the process and their actions are now under the constitutional scrutiny. The conduct of the employer does not show good faith on its part.

C. Does the order restraining the NBCL to refrain from issuing individual contract contravene s. 37(1) (a) of the ERA.

29. In respect of ground 4, it was argued that since there was no CA between the parties, the ERT should not have ordered that the employer cease from issuing individual contracts to the union members.

30. Mr. Nair said that s. 37(1) (a) of the ERA requires that the employment contract be in writing and that the order contravenes this provision of the law.

31. S. 37(1) applies to foreign contracts of service. In this matter, the employee are not on foreign contracts of service. The ERT's order has not contravened any provision of the ERA. The reason why that order was necessary was because the employer was refusing to enter into collective bargaining on the basis that the employees have individual contracts of service. That was the basis on which the employer tried to take control of the workers and discourage them from joining a trade union. This is in direct breach of the worker's rights. The employer also used the employee's individual contract as a shield to justify its refusal to enter into collective bargaining. I cannot endorse such conduct,

32. There are instances where the courts have to issue orders to ensure that there is efficacy and compliance. I find that when individual contracts are issued, the workers do not have proper representation to bargain on the terms. They are just bound to accept what is offered to them. A CA is properly negotiated by the union. A union has more bargaining capacity and power than individual employees. If the employer is allowed to issue individual contracts, the employees may agree to less advantageous terms. The Union then will find it difficult to negotiate proper terms for them. It is for this reason that the individual contracts will not assist in the collective bargaining. To make the process effective, the order issued to the effect that NBCL refrains from issuing individual contracts to the union's members is proper in law and on the facts of the case.

D. When is an employee entitled to a wages statement?

33. In respect of ground 5, Mr. Nair argued that the ERT ordered compliance with s. 44(1) of the ERA which provides for the employer to give to the worker a wages statement. The employer's contention is that it has at all material times provided the employees with the wages slips and also whenever the employees have required such slips. In the absence of any complaint from the employees or the Labour Office, the ERT just relied upon the hearsay application by the union and issued the compliance order.

34. The employer also argued that since the TWU is not a party to the contract, it did not have the right to ask for compliance of the contract.

35. I think Mr. Nair does not see the problem in the context of the situation between the parties. There are workers who have joined the union. They have authorized deduction of union fees from their salary. The employees will only know whether the union fees is being deducted or not, is when they see the evidence and the only proper evidence is the pay slip.

36. It may be that the wages are being deducted and not sent to the union. There could be instances where this happens. Since there is a change of circumstances of the employees in that they have joined the trade union, the employees are expecting a change in their wages slip. It is for this reason that if they request for the salary slip they should be provided with one.

37. S. 44 (1) is the provision which states that subject to subsection 2, an employer must provide to the worker the wages slip at the time of paying the worker. Subsection 2 says that if a worker's wages are to be on the basis of an annual amount payable in not less than 12 nor more than 26 equal installments, the employer is required to provide the worker with the wages statement only on the following occasions:

    a. *On the conclusion of the first full wage period after the commencement of service with the employer;*

    b. *In the event of their occurring a change in the particulars set out in subsection (1) in respect of a worker; or*

c. *On termination of the contract of service.*

38. What is therefore clear is that those who are paid weekly are entitled to be gives the wages statement when they are paid. There need not be any request or compliant made. Those who are paid monthly and fortnightly will get a wages statement if there is a change.

39. I therefore find Mr. Nair's concern naïve that there ought to be a complaint before the wages statement is issued. The ERT's order was to provide the wages statement if the worker requests. I do not find that there is anything prejudicial in providing the wages statement because the workers are either entitled as of right to have it or some of them need to have it because of the prospective change that they are anticipatin***g.***

E. The Employer's Striking Out Application in the ERT

40. In the final ground of appeal, Mr. Nair argued that the ERT did not hear its application to strike out causing it prejudice. I find this ground without any merit. When the TWU had filed the compliance application, the NBCL had a right to respond to the application. If they opposed the application, it became axiomatic that they were asking for the application to be struck out. There was no need to file a separate application for striking out. If it was done, there was no need to hear that separately as the ERT could amalgamate the two and hear it collectively.

41. The NBCL has not shown to me what argument or ground that it relied on the striking out application would make a difference to the outcome of the ERT"s decision. No such issue was raised in the appellate court. I find that the striking out application was a duplicity. The employer was not deprived of its right to raise all matters that it intended to when the application for compliance was heard.

F. The Compliance Application

42. I now come to the application for compliance. Due to the appeal, the ERT's orders had not been complied with. It is in the interest of the workers that there should be some stern directions given to comply with the order of the ERT.

43. S. 212(6) of the ERA states that *"if a person fails to comply with a compliance order made under this section, the person prejudicially affected may apply to the court for the exercise of its powers under s. 221(6)"*.

44. Since the orders issued by the ERT were compliance orders, this court can under s. 221(6) order the person in default to be punished.

45. To my mind, it is proper that I first set a time frame for compliance of the orders in default of which I intend to take more draconian steps against the employer. I therefore intend to set a timeframe within which the deductions should begin and the period from which it shall be so effected.

46. The TWU is asking for deductions to be effected from 12 December 2017, this being the date on which the deduction authority from the employees were handed over to NBCL. The compliance order was issued on 23 July 2018. I think that when the compliance order was issued, the NBCL should have started the deductions so that in the end the employees are not burdened by the backdated deductions. These are employees who do not earn much and if the deductions were to begin from 23 July 2018, they would be subject to a huge deduction. The question is why should they be penalized for such actions of the employer?

47. The question that I now need to ask is whether the employees would be prejudiced if the deductions are ordered to be made for lost period. The answer is in the affirmative. It is for this reason that I will not order compliance from the date of the order. I will however put in place some stringent measures for compliance so that the employees are not prejudiced any further.

Final Orders

48. In the final analysis I do not find that the appeal has any merits and I dismiss the same.

49. On the compliance orders I make the following orders:

   a. *That within 7 days from the date of the order, the employer shall start deducting the union fees in respect of all those employees who are currently employed by NBCL and whose names have been submitted by TWU.*

   b. *If there is any failure to deduct the union fee, the employer will be liable for payment of the fee in arrears without deducting the same from the employees' wages.*

   c. *Further, if there is any failure to deduct the fees as outlined above, all the Directors of the company shall then show cause why an order for a penalty or a term of imprisonment should not be imposed on them.*

   d. *The NBCL is to meet the TWU within a period of 7 days for the purposes of collecting bargaining. The time and venue for the meeting shall be appointed by TWU. Any failure to attend the meeting shall be treated as contempt of an order of the Court and the Directors shall be answerable for such non-compliance.*

   e. *The employees shall also be provided with the wages statement as and when they so request.*

   f. *The employer shall not issue any individual contracts to the subject employees until such time the parties enter into a collective bargaining. If any such action is taken by the employer, the employees are to inform the TWU for it to take proper action for defiance of court orders. The employees are then at liberty to refuse to sign the individual contracts and they are not to be penalized by the employer.*

50. I also order the employer to pay costs to TWU in the sum of $5,000 within a period of 7 days.

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Hon. Madam Justice Anjala Wati

Judge

25. 03.2021

To:

1. ***Mr. D. Nair for the Appellant.***
2. ***Mr. S Naidu for the Respondent.***
3. ***File: ERCA 19 of 2018 and ERCC 20 of 2018.***