

IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

ORIGINAL JURISDICTION

CASE NUMBER:

ERCA 04 of 2018

BETWEEN:

ANIL KUMAR PRASAD

PLAINTIFF

AND:

THE MINISTRY OF EDUCATION, HERITAGE AND  
ARTS

RESPONDENT

Appearances:

*Mr. D. Nair for the Plaintiff.*

*Ms. O. Solimailagi for the Defendant.*

Date/Place of Judgment:

*Friday 22 October 2021 at Suva.*

Coram:

*Hon. Madam Justice A. Wati.*

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A. Catchwords:

*Employment Law – Claim against Ministry of Education, Heritage and Arts which is included as an Essential Service and Industry within the meaning of the term - Whether the claim constitutes a trade dispute within the meaning of s. 185 of the ERA – When did the employment grievance between the parties first arise – Whether the employment grievance is time barred in that it was not lodged within 21 days from the time it first arose – whether the right to maintain an action on a contract for renewal can be maintained when the same has been superseded by a new contract under the reform undertaken by the Government.*

B. References:

(i). Legislation

1. *The Employment Relations Act 2007 ("ERA"); ss.185; 188.*

*Cause*

1. The defendant has applied for the action brought by the plaintiff through an originating summons to be struck out on the grounds that:

(a) *The cause of action relates to a trade dispute that exceeds the jurisdiction of the Employment Relations Court ("ERC") under s. 188(1) of the ERA; and*

(b) *Alternatively, the action is time barred under s. 188(4) of the ERA;*

2. The plaintiff's originating summons seeks the following relief:

(a) *A declaration that the defendant ("Ministry") has acted contrary to the legitimate expectation of the applicant and further its decision to appoint the plaintiff as Vice Principal is unjustified, discriminatory and in breach of the principles of fair labour practice.*

(b) *An order that the defendant immediately reinstates the applicant to the position of Principal at Vunimono High School which he held in the confirmed capacity since 19 January 2015.*

*Background.*

3. I will identify the background facts leading to the issues between the parties as deposed in the affidavits.

4. The plaintiff says that he has been employed in the public service by the Ministry since 1988. He has served in various schools in different capacities until his promotion as Acting Principal of Vunimono High School from January 2014.

5. On 19 January 2015, he was confirmed as Principal of Vunimono High School. A contract of employment was attached to the affidavit to verify this position. The plaintiff says that without rescinding this existing contract, the defendant issued a letter dated 10 November 2017 and again appointed him in the acting capacity from 15 January 2018 to 22 August 2021. A new contract to this effect was issued to the plaintiff.
6. Subsequently, the position of the Principal was advertised and the plaintiff says that he was asked to apply for the same which he did. He says that on 16 February 2018, he was informed that he was eliminated without giving any consideration to the fact that he was the substantive Principal of the same school having served in that position since 2014.
7. On 21 February 2018, the plaintiff says that he filed his request for review of the decision with the Ministry and received a response on 7 March 2018. The decision was that the elimination still stands.
8. He says that he has the potential, ability, experience and competence to continue in the confirmed position as the Principal. The plaintiff says that he believes that since he was promoted to that position of the Principal at Vunimono High School after going through the due process, there was no justification and reasonable cause for his demotion and subsequent elimination from being considered for the same post.
9. It is the plaintiff's contention that the defendant acted in bad faith by failing to take into account that he has been managing the helm of the school without any adverse reports since 1988. To eliminate him has greatly affected and disadvantaged him in terms of his career enhancement.
10. The plaintiff already had a contract for the position of the Principal of the same school and by not re-appointing him, the defendant breached the principles of fair labour practices and the principles of equal opportunity.

11. The plaintiff alleges that by demoting him as the Vice Principal and then appointing him to act as the Principal merely confirms that he has the competence and leadership qualities to continue performing the duties of the post. However, by eliminating him for the substantive post has deprived him of a fair and equal employment opportunity for promotion which is contrary to the spirit of the employment contract that existed between the parties and the principles of fair labour practices.
12. The plaintiff says that his employment contract for the position of the Principal contained a proviso for renewal. His contract should be renewed for the same position as the defendant is aware of his proven potential and capacity to continue performing the duties required of the post which is confirmed by the fact that he was appointed to act on the same position.
13. The defendant says that on 21 January 2015, the plaintiff was appointed to the position of the ED1D and posted to Vunimono High School for a term of 3 years effective 19 January 2015 with an annual salary of \$42,691. This appointment was made before the civil service reform by the Government in 2016.
14. Between March and November 2016, the Government of Fiji carried out the reform in the civil sector ("*Civil Service Reform*"). This reform came about as result of the recommendation in the report from the World Bank. The defendant Ministry came under the reform too. Part of the reform process was to modernize the civil service salary structure.
15. The modernization of the salary structure included the broad banding of positions and benchmarking the same against the private sector to decrease administration, streamline salaries and provide attractive and competitive salaries.
16. Prior to the reform, the positions within the civil service, including the Ministry, were based on 57 different salary scales out of which 26 salary scales applied to the teaching positions.

17. Due to the reform, the government, in January 2017, implemented the *Job Evaluation and Civil Service Remuneration Setting Guidelines ("Job Evaluation Exercise: the JEE")* to assist the Permanent Secretaries of each government ministry to define the new positions and the salary band assigned to these positions. The review of the remuneration was based on the requirements of the position as defined in the job description and not on the personal attributes of any employee.
18. As a result of the reform, 15 salary bands were introduced in the levels A to O: A being the lowest level and O the highest. The new salary bands replaced the old. To facilitate the transition of civil servants old positions and salary scales to the new positions and salary scales, the government also implemented the *Job Evaluation Transition Procedures* to ensure consistency across the civil service.
19. The transition of the civil servant positions including the teachers provided for an increase of no more than 15% of their salaries under their existing substantive positions. Civil servants whose new salary matched the salary band for the positions they held were automatically moved to the corresponding new substantive positions with the applicable salary band. For those civil servants whose salary did not match the salary band of their existing positions were redeployed in accordance with the *Job Evaluation Transition Procedures*.
20. The principal ED1D position was reclassified to the new positions of Principal Large, Principal Medium and Principal Small depending on the overall number of teaching positions at the respective schools. The position of Principal Large was for schools with more than 50 teachers and based on salary band "L". The position for Principal Medium was for schools having teachers between 25 and 50 on salary band "K" and the position for Principal Small was for schools which had up to 25 teachers and based on salary band "J". A school with Principal Small had no Vice Principal.

21. The plaintiff's salary of \$42,691 on the Principal ED1D position did not match the Principal Large for Vunimono High School which is based on salary band "L" with starting salary of \$67,830.20.
22. On 17 August 2017, the ministry appointed the Plaintiff to the Vice Principal position at Vunimono High School with the salary of \$46,627.14 for a term of 5 months. The 5 months period was given since that was the balance term left from the plaintiff's contract of employment as the Principal of that school.
23. Subsequently, the plaintiff was appointed to the Acting Principal Large position at Vunimono High School for the period 13 August 2017 to 24 November 2017. He was reappointed to the Acting Position on 9 November 2017 for the period 25 November 2017 to 6 May 2018.
24. On 10 November 2017, the Ministry offered the plaintiff an employment contract for the position of Vice Principal of Vunimono High School for the period 15 January 2018 to 27 August 2021. The Ministry has not received a signed copy of the contract. However, the plaintiff confirmed through an email correspondence to Ms. Jane Curran, the Director of Civil Service Reform Unit that his current employment contract dated 11 November 2017 for the position of the Vice Principal is still in place.
25. The position of Principal Large Vacancy Number 78/2017 was advertised by the Ministry in November 2017 which the plaintiff applied for and was unsuccessful. The Ministry advised the plaintiff of this by a letter dated 15 February 2018. He was informed that he did not meet the threshold score for the next stage of the selection process.
26. On 7 March 2018, the Public Service Commission advised the Ministry that procedural review requests from some applicants for the Principal Large position have been considered and held to be unsuccessful.

*Issues*

27. On the application for striking out, the issues that this Court needs to determine are:

1. *Whether the claim before the court amounts to a trade dispute thus outside the jurisdiction of the ERC to determine?*
2. *If the claim constitutes an employment grievance within the meaning of the term, was the same lodged within time over which the court can preside and determine?*

*Law and Analysis*

28. The first issue raised by the defendant is that the claim brought by the plaintiff constitutes a potential trade dispute and the ERC does not have jurisdiction to hear and determine trade disputes concerning an essential service and industry. The defendant relies on s. 188(2) of the ERA. For the issue to be resolved, I need to examine s. 188 (1) and the definition of the terms *employment grievance* and *trade dispute*.
29. It is not disputed by the plaintiff that the Ministry is defined as an essential service and industry under s. 185 of the ERA which states that the government and the statutory authority is included in the definition of essential service and industry. The Ministry of Education, Heritage and Arts is a government ministry controlled and managed by the government and as such it is covered under Part 19 of the ERA. Part 19 deals with matters relating to essential services and industries.
30. What the plaintiff is challenging is the non - renewal of his contract of employment as the Principal of Vunimono High School which he signed before the civil service reform undertaken by the Government of Fiji. He also challenges the decision to appoint him the Vice Principal of the same school during the pendency of his contract of employment which was done post the civil service reform.
31. S. 188 reads:

*Jurisdiction over trade disputes and employment grievances*

188 (1) *“All trade disputes in essential services and industries shall be dealt with by the Arbitration Court in accordance with this Part.*

(2) *The Employment Relations Tribunal and the Employment Relations Court established under Part 20 shall not have any jurisdiction with respect to trade disputes in essential services and industries.*

(3) *For the avoidance of doubt, Part 20 shall not apply to essential services and industries, except as provided under subsection (4).*

(4) *Any employment grievance between a worker and an employer in essential services and industries that is not a trade dispute shall be dealt with in accordance with parts 13 and 20, provided however that any such employment grievance must be lodged or filed within 21 days from the date when the employment grievance first arose, and-*

(a) *where such an employment grievance is lodged or filed by a worker in an essential service and industry, then that shall constitute an absolute bar to any claim, challenge or proceeding in any other court, tribunal or commission; and*

(b) *where a worker in an essential service or industry makes or lodges any claim, challenge or proceeding in any other court, tribunal or commission, then no employment grievance on the same matter can be lodged by that worker under this Act”.*

32. The above section makes it clear that the ERC can only hear employment grievances between a worker and an employer in an essential service and industry. The ERC does not have



jurisdiction to hear trade disputes between a worker and an employer in an essential service and industry.

33. What constitutes an employment grievance and what a trade dispute needs to be clearly looked at. The definitions are provided under s. 185 of the Act. An employment grievance *means a grievance involving dispute of rights including the following matters –*

*(a) dismissal or termination of any worker;*

*(b) discrimination within the terms of Part 9;*

*(c) duress in relation to membership or non-membership of a union;*

*(d) sexual harassment in the workplace within the terms of section 76; or*

*(e) worker's employment, or one or more conditions of it, is or are affected to the worker's disadvantage by some unjustifiable action by the employer.*

*but shall not include any dispute of interest.*

34. A trade dispute means *a dispute as to disputes of interest which includes a threatened, impending or probable dispute. A dispute of interest is defined as matters or disputes arising between employers and trade unions out of collective bargaining and pertaining to the relations of employers and workers which are connected with the employment or non-employment or the terms of employment, or the conditions of work of any person, but shall not include matters concerning dispute of rights.*

35. The issue before me is the plaintiff's application to have his contract before the civil service reform renewed and his position of the Principal given back to him. He also seeks to challenge the act of appointing him to the position of the Vice Principal post the civil service reform during the pendency of his contract of employment. The application therefore arises as a result of the civil service reform which the plaintiff asserts has affected him and his conditions of the employment. The civil service reform did not arise as a result of the collective

bargaining between the government and the Trade Union for which the plaintiff is a member. It arose as a result of its initiative for a reform. The reform initiative arose after the recommendations from the World Bank to modernize the salary structure for the civil service sector. This is very clear from the defendant's own affidavit in paragraph 4 which I cite in full:

*"Between the period from March 2016 to November 2016, as part of the Fijian Government's civil service reforms which included the Ministry, the Fijian Government agreed on recommendations from the World Bank reports to modernize the salary structure for the civil service. The modernization of salary scales included the broad banding of positions and benchmarking to the private sector to decrease administration, streamline salary management and provide attractive and competitive salaries across the civil service".*

36. If the issue arose as a result of the collective bargaining then the matter would be classified as a trade dispute and not an employment grievance. The pertinent words in the definition of the term trade dispute are *"matters or dispute arising out of collective bargaining..."*
37. The affidavits filed by the defendant does not state that the plaintiff's contract of employment as a Vice Principal during the pendency of his contract as the Principal of the same school came about as a result of the collective bargaining. How then can the concern arising from the new contract be a trade dispute?
38. It maybe that the plaintiff's Union was consulted and informed about the reform but it is very clear that the civil service reform was not as a result of the collective bargaining. There was no negotiation and discussion with a view to reaching/reviewing any form of a collective agreement between the government and the plaintiff. The definition of collective bargaining is *"treating and negotiating with a view to concluding a collective agreement or reviewing or renewing such agreement": s. 185 of the ERA.*
39. In essence the plaintiff's claim falls under the definition of the employment grievance. I therefore find that the court has jurisdiction to hear the matter filed before it.

40. The next issue for determination is the time limitation. It is the defendant's contention that after the civil service reform, the plaintiff received a new contract on 17 August 2017 and if the plaintiff was aggrieved, he ought to have lodged or filed the grievance within 21 days from the date he was given the new contract. He did not bring any action within 21 days but filed an application on 12 March 2018. He is out of time and his application ought to be struck out.
41. The plaintiff says that the time must run from 7 March 2018 being the day on which his review application to the Ministry for Civil Service was unsuccessful. The review of course was in regards his unsuccessful application for the position of the Principal of the School he was acting in.
42. In my view for me to decide the period from which the time starts to run in this case I must see what the claim is about. It is very clear from the plaintiff's originating summons that he is aggrieved at two things, the first is that his contract dated 15 January 2018 for the position of the Principal which was given to him before the civil service reform was not renewed and that the same was replaced by a new contract for the position of the Vice Principal in August 2017 post the civil service reform. I redirect my attention to the prayers sought by the plaintiff and reiterate what I have said in paragraph 2 of this judgment. Since the declaratory orders are confined to his contract dated 15 January 2018 and how it was replaced unfairly and contrary to his legitimate expectation, I find that the grievance first arose in August 2017.
43. This is the time when the plaintiff was offered a new contract for the Vice Principal which the plaintiff accepted on a salary which was higher than that he was paid when he was the Principal of the school. If the plaintiff was not happy with the actions of his employer then he should have filed a claim within 21 days from the time his contract was replaced. He did not do so and as such any grievance regarding that is now time barred.

44. The plaintiff has not challenged the fairness of the open merit recruitment scheme policy employed by the ministry to select a candidate for the position of the Principal for which his application was not successful. The open merit recruitment scheme policy allows all the eligible candidates to apply for the position and the best candidate will be selected for the position. The plaintiff cannot legitimately expect that since he was acting on that position, he was entitled as of right for an appointment to the substantive position. The plaintiff cannot also say that he was the Principal of that school before and so he should continue in that role. What he does not realize is that post the civil service reform, the salary band for the principal position had changed and so did the merit requirement for the appointment.

45. Be that as it may, if the claim challenged the fairness of the open merit recruitment scheme and the procedural irregularity deployed by the Ministry in the filling of the vacancy, then the time period would run from 7 March 2018 but the claim does not seek to challenge the open merit recruitment scheme.

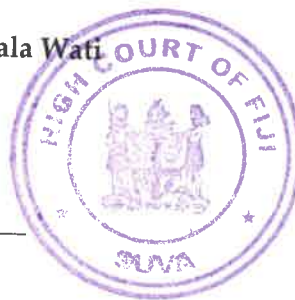
*Final Orders*

46. In the final analysis I find that the plaintiff's claim is an employment grievance which can be heard by the ERC but is time barred under s. 188(4) of the ERA in that the grievance was not filed within 21 days from the time it first arose. I therefore dismiss the plaintiff's claim and order it to pay costs to the defendant which I summarily assess in the sum of \$2000. The costs are to be paid within 14 days from the date of the judgment.

  
Hon. Madam Justice Anjala Wati

Judge

22. 10. 2021



To:

1. Mr. D. Nair for the Plaintiff.
2. AG's Chambers for the Defendant.
3. File: Suva ERCC 04 of 2018.