

IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

APPELLATE JURISDICTION

CASE NUMBER: ERCA 05 of 2016

BETWEEN: **TOME MASAU**

APPELLANT

AND: **FIJI PUBLIC SERVICE ASSOCIATION**

RESPONDENT

Appearances: Mr. N. Tofinga for the Appellant.

Mr. R. Singh and Ms. B. Vuli for the Respondent.

Date/Place of Judgment: Wednesday 16 August 2023 at Suva.

Coram: Hon. Madam Justice Anjala Wati.

RULING

A. Catchwords:

Employment Law - Leave to Appeal the Decision of the Tribunal - appellant filed a claim for unlawful and unfair dismissal from work - employer made an application for the Tribunal to determine that the appellant was not a worker within the definition of the law- worker then withdrew his claim- later after 5 years of withdrawing his claim, he required the Tribunal to rule on his claim- Tribunal ruled that he was an attaché at work and not a worker to make the claim- the appellant then sought leave to appeal the decision of the Tribunal - the appellant having withdrawn his claim could not have required the Tribunal to rule on the same unless he filed a fresh claim - in any event the decision of the Tribunal was not an interlocutory decision as it was final in determining that the appellant was not a worker of Fiji Public Service Association and did not have the right to make the claim- the application for leave is misconceived.

B. Legislation:

1. *Employment Relations Act 2007 ("ERA"): s.243.*

1. The appellant Tome Masau has filed an application for leave to appeal the decision of the Tribunal of 5 May 2016.
2. Tome Masau had filed an employment grievance in the Tribunal in 2011. The employer then filed an application for the Tribunal to determine that the appellant was not a worker within the definition of the Employment Relations Act and as such he could not bring the grievance before the Tribunal. The Tribunal found that Tome Masau was only an attaché and that he was not a worker within the definition of the law which precluded him from bringing a claim for unlawful and unfair dismissal.
3. In the appeal it became apparent that on 1 June 2011, Tome Masau had written to the Registrar of the Tribunal and withdrawn his grievance. The letter was in the following terms:

*“The Registrar
Employment Tribunal
Suva.*

Dear Sir,

Re: Tome Masau v FPSA

I do not have any intention of pursuing my grievance and would like to withdraw the same from the Tribunal. I want to thank the FPSA for giving me employment and I hope that in future if any vacancy comes than I will be considered.

*C/- Tome Masau
DPP’s Office
Suva (signed Tome Masau)”*

4. After that letter was written to the Tribunal, the matter lay dormant in the Tribunal because the claim was not pursued. In my view the matter was discontinued. Then in 2016, after 5 years of withdrawing his claim, Tome Masau approached the Tribunal for the ruling in his case. The Tribunal then delivered a ruling on the employer’s application in the terms identified above.

5. Following the decision of the Tribunal, Tome Masau sought leave to appeal the decision of the Tribunal on the basis that the decision of the Tribunal was interlocutory in nature.
6. The conduct of Tome Masau is very concerning. He had in fact withdrawn his case from the Tribunal on 1 June 2011. There was therefore no claim before the Tribunal to pursue.
7. Once the substantive claim was withdrawn, all other applications connecting to the substantive claim also got discontinued. After 5 years, Tome Masau required a ruling in the matter. The Tribunal's error was in delivering the ruling on the employer's application when the appellant's claim was no longer alive.
8. Litigants must not run the litigation process at their whim. They cannot require the Tribunal or the Court to act in the manner they wish. There is a sound procedure in law that a claim, once withdrawn, cannot be revived unless a fresh claim is filed. Tome Masau never filed a fresh claim. On what basis did he then ask for a ruling in the cause? There was no claim alive to give the ruling. That is the reason the Tribunal did not act in the matter for 5 years until it was confronted by Tome Masau. All the Tribunal should have done was to write and say that the matter was discontinued upon Tome Masau's application in writing and that there was no case pending before it. It should not have acted in haste and delivered the ruling on the employer's application.
9. In the appeal, Mr. Tofinga argued that Tome Masau could not have withdrawn the appeal without the consent of the other party. That is not correct. The other party cannot stop a claimant from withdrawing his claim. The other party's entitlement from a withdrawal application lies in costs which the employer did not make. The employer did receive a copy of the letter of withdrawal and upon seeing that, it filed it away in the file with the belief and understanding that the matter has come to an end. There was therefore nothing remaining even for from the employer's end for the Tribunal to determine.
10. Mr. Tofinga does not dispute that Tome Masau had withdrawn the cause. In that regard I find the application for leave to appeal frivolous and vexatious. In fact Tome Masau

ought to pay costs of the proceedings for his conduct in requiring the Tribunal to give a ruling on an application he had discontinued and then again putting the Fiji Public Service Association to more costs when it filed the application for leave to appeal the decision.

11. I finally to wish to briefly reflect on s. 243 of the ERA which states that a person who is dissatisfied with an interlocutory order of the Tribunal may, within 14 days, apply to the Court for leave to appeal. I do not find that the decision of the Tribunal was interlocutory in nature. It was a final decision which determined that the appellant was not a worker within the definition of the law.
12. In the final analysis, I find the application for leave to appeal the decision of the Tribunal frivolous and vexatious and I dismiss the same. I order Tome Masau to pay costs to FPSA in the sum of \$2,500.00 within 21 days.



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Hon. Madam Justice Anjala Wati

Judge

16.08.2023

To:

1. ***Fiji Teachers Union for the Appellant.***
2. ***Fiji Public Service Association for the Respondent.***
3. ***File: Suva ERCA 05 of 2016.***